Supreme Court, U.S.
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Nos. 98-6248 & 98-6339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

UNITED STATES OF AMERICA,
ex rel. CHARLES T. HUTCHINS, Petitioner

v.

WILENTZ, GOLDMAN & SPITZER, Respondent

CHARLES T. HUTCHINS, Petitioner

v.

WILENTZ, GOLDMAN & SPITZER, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Charles T. Hutchins, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 13, 2001, as amended on August 16, 2001.

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE FALSE CLAIMS ACT ONLY PROHIBITS FRAUDULENT CLAIMS THAT CAUSE OR WOULD CAUSE ECONOMIC LOSS TO THE GOVERNMENT?

2. WHETHER FALSE CLAIMS, SUBMITTED TO THE U.S. BANKRUPTCY COURT FOR PAYMENT APPROVAL, THAT FRUSTRATE PUBLIC POLICY GOALS OF THE UNITED STATES BANKRUPTCY CODE, CONSTITUTE INJURIES TO THE UNITED STATES THAT ARE ACTIONABLE UNDER THE FALSE CLAIMS ACT?

3. WHETHER PROPERTY TURNED OVER TO CHAPTER 7 TRUSTEES BY DEBTORS FOR DISPOSITION IN ACCORDANCE WITH THE PROVISIONS OF THE U.S. BANKRUPTCY CODE, IN EXCHANGE FOR A DISCHARGE OF DEBTS, BECOMES PROPERTY OF THE UNITED STATES SUBJECT TO THE PROVISIONS OF THE FALSE CLAIMS ACT?

4. WHETHER THE COURT OF APPEALS USED THE CORRECT STANDARD TO DETERMINE (1) IF APPELLANT WAS ENGAGED IN PROTECTED CONDUCT, (2) IF APPELLEE WAS PUT ON NOTICE OF THE POTENTIAL FOR FALSE CLAIM ACT LITIGATION, AND (3) IF APPELLANT WAS A FRAUD INVESTIGATOR FOR FALSE CLAIMS ACT PURPOSES?

PARTIES

Plaintiff in U.S. District Court Case No. 96-4678 was Charles T. Hutchins. Named Defendants were the New Jersey law firm of Wilentz, Goldman & Spitzer, P.C., Louis DeLucia, Esq., and Joan Lavery, Esq.

Plaintiff in U.S. District Court Case No. 96-5988 was United States of America, ex rel. Charles T. Hutchins. The named Defendant was Wilentz, Goldman & Spitzer, P.C.

CORPORATE LISTING

The law firm of Wilentz, Goldman & Spitzer, P.C., is a Professional Corporation. Wilentz, Goldman & Spitzer, P.C. is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation that has a financial interest in the outcome of this litigation.

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OPINIONS BELOW

The November 8, 2001, Order of the Court of Appeals for the Third Circuit, for Case Nos. 98-6248 & 98-6339, denying the petition for rehearing en banc is reprinted as Appendix 1.

The August 16, 2001 Order amending the Slip Opinion[1] of the Court of Appeals for the Third Circuit, for Case Nos. 98-6248 & 98-6339, whose judgment is herein sought to be reviewed was reported at 253 F.3d 176 (3d Cir. 2001). See Appendix 2.

The June 13, 2001 Order and Opinion of the Court of Appeals for the Third Circuit, for Case Nos. 98-6248 & 98-6339, whose judgment is herein sought to be reviewed was reported at 253 F.3d 176 (3d Cir. 2001). The Order and Opinion are reprinted as Appendix 3 and Appendix 4.

The September 8, 1998, Opinion of the U.S. District Court for the District of New Jersey, for Case No. 96-4678, whose judgment is herein sought to be reviewed,

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[1] A consolidated opinion incorporating the August 16, 2001 amendments with the June 13, 2001 Opinion is provided for the Court's convenience at Appendix 9. This consolidated opinion was not prepared by the Court of Appeals for the Third Circuit.

was not reported. The Order and Opinion are reprinted as Appendix 5 and Appendix 6.

The August 4, 1998, Opinion of the U.S. District Court for the District of New Jersey, for Case No. 96-5988, whose judgment is herein sought to be reviewed, was not reported. The Order and Opinion are reprinted as Appendix 7 and Appendix 8.

JURISDICTION

The District Court had jurisdiction over Appellant's qui tam and retaliatory discharge claims under 28 U.S.C. § 1331. The Court of Appeals for the Third Circuit had jurisdiction over the District Court's final order dismissing his claims under 28 U.S.C.§ 1291. The Court of Appeals exercised plenary review over the District Court's grant of summary judgment on Appellant's retaliatory discharge claim and its dismissal of Appellant's qui tam claim under Fed. R. Civ. P. 12 (b)(6). Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 822 (3d Cir. 1999); Malia v. Gen. Elec. Co., 23 F.3d 828, 830 (3d Cir. 1994), cert. denied, 513 U.S. 956 (1994). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Charles T. Hutchins ("Appellant") worked at the law firm of Wilentz, Goldman & Spitzer ("Appellee") as a paralegal from January 1993 until October 1995 while attending the evening law school program at Seton Hall Law School. Appellant inadvertently learned of circumstances he thought to constitute billing fraud in matters before the U.S. Bankruptcy Court. He reported to Louis T. DeLucia, Esq. ("DeLucia"), via memo, that Appellee was billing bankruptcy estates 1.5 times the actual amount of Westlaw and Lexis expenses incurred in estate related matters. (A 14, Page 10). DeLucia was a partner in the Appellee's creditors' rights department.

Appellant was terminated by Appellee on October 2, 1995, after Appellee's actions calculated to make him quit had failed. That same day Appellant traveled to the Assistant U.S. Trustee's Office in Newark, New Jersey, and orally related his knowledge of billing fraud at Appellant's law offices. He was instructed to prepare an affidavit setting forth the specific acts of billing fraud that were within his personal knowledge. Appellant subsequently prepared a letter to the Assistant U.S. Trustee, and a sworn affidavit (A 14, Page 1), detailing

his knowledge of over-billing by Appellee, and delivered it to the Assistant U.S. Trustee's Office in Newark on October 18, 1995.

Appellant filed a Complaint against Appellee, DeLucia, and Joan Lavery, Esq. for Wrongful Termination and Defamation[2] on October 1, 1996. Appellant filed a False Claim Act Complaint against Appellee on December 20, 1995.

By knowingly submitting fee applications to the U.S. Bankruptcy Court for payment approval that contained inflated expenses (including Westlaw costs, Lexis costs, and photocopy charges), Appellee violated numerous provisions of the False Claims Act ("FCA"), deprived creditors of larger distributions, and frustrated the public policy goals of Congress as set forth in the Bankruptcy Code.

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[2] After terminating Appellant, Appellee commenced a campaign of character assassination against Appellant – telling Wilentz employees that criminal complaints had been filed against Appellant, that restraining orders had been issued against Appellant, that Appellant was going to return to Wilentz offices and spray the offices with gunfire, and that Appellant has threatened to sodomize a female employee of Wilentz.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Erred When it Held that the FCA Only Prohibits Fraudulent Claims that Cause or Would Cause Economic Loss to the Government; Frustration of Public Policy Objectives Constitute Injuries that are Actionable Under the FCA.

In its Opinion dated June 13, 2001, as amended on August 16, 2001, the Court of Appeals for the Third Circuit held that "the False Claims Act only prohibits fraudulent claims that cause ***or would cause*** economic loss to the government," (A 9, Page 3) and "[t]he False Claims Act seeks to redress fraudulent activity which ***attempts to or actually*** causes economic loss to the United States government." (A 9, Page 17)(emphasis to August 16, 2001 Opinion amendments). The text of the Opinion holds that the economic loss to the government, actual or potential, must be in the form of money paid, or to be paid, from the treasury.

This Petition should be granted because the Third Circuit's holding is contrary to and in conflict with the unambiguous language of 31 U.S.C. § 3729 (See Appendix 10 for relevant text), with prior U.S. Supreme

Court decisions, with the FCA legislative history, and with numerous Appellate Court holdings.

The language of the FCA statute itself is quite clear. It is the knowing presentation of a false or fraudulent claim to an officer or employee of the U.S. Government, for payment or approval, that constitutes a FCA violation. Payment of a claim is not required. The statutory language is also clear that Congress intended the FCA to reach beyond false claims for payment. By adding the words "or approval,[3]" Congress made it clear that the FCA includes acts other than payment wherein government approval was crucial to the receipt of a benefit for a defendant.

The statutory language selected by Congress anticipated both the bankruptcy situation at issue here and the false or fraudulent claim without "payment-

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[3] 11 U.S.C. § 3729(a)(1) provides "Any person who -- knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment ***or approval***;" 11 U.S.C. § 3729(a)(2) provides "Any person who --knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid ***or approved*** by the Government;" (emphasis added).

injury-to-the-government" situation. The language of 31 U.S.C. § 3729(a) lists seven different ways that the FCA may be violated, where even an unsuccessful attempt to commit any of these acts gives rise to a civil penalty of "not less than $5,000 and not more than $10,000." If an unsuccessful attempt gives rise to liability, damage to the public fisc is not a prerequisite to a FCA violation.

In United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995), the Court held that "the [FCA] statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the "claim for payment."" FCA actions have been sustained under theories of supplying substandard products or services (see, e.g., United States v. Aerodex, 469 F.2d 1003 (5th Cir. 1972)); false negotiation, including bid rigging and defective pricing (see, e.g., United States v. Ehrlich, 643 F.2d 634 (9th Cir.), cert. denied, 454 U.S. 940, 102 S.Ct. 474, 70 L.Ed.2d 247 (1981)); and false certification (see, e.g., United States v. Hibbs, 568 F.2d 347 (3d Cir. 1977)."

In United States v. Peter Mackby 261 F.3d 821, 826 (9th Cir. 2001), the Court held that "a claim may be false even if the services billed were actually provided, if the

purported provider did not actually render or supervise the service[4] (citing to Peterson v. Weinberger, 508 F.2d 45, 52 (5th Cir. 1975)(holding that a defendant was liable under the FCA although services billed to Medicare were performed by qualified people, where the claim forms falsely certified that the defendant was the provider)(cited with approval in S.Rep. No. 99-345, at 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274.

In United States ex rel. Schwedt v. Planning Research Corp., 59 F.3d 196 (D.C. Cir. 1995), the Court held that if false progress reports were submitted, by a computer software company, to the government that caused the government to disburse funds to this company sooner than it would have without the false report, such false report would "constitute false statements in support of false claims and would trigger the Act's civil penalty." Id. at 199. Similarly, in Young-Montenay v. United States, 15 F.3d 1040 (Fed Cir. 1994), the Court found FCA liability for the submission of false progress reports.

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[4] Dr. Mackby instructed Medicom and office Medicare billing personnel to substitute his personal identification number ("PIN") for another doctor's PIN on Medicare claim forms.

Appellees argue that funds from the treasury must be at risk before FCA liability can attach, but there is no case law, statutory or legislative history to support that position. In fact, analysis of the plain language of the statute conclusively demonstrates that Congress intended no such restriction. If funds of the treasury must be at risk, as Appellee contends, the § 3729(a)(1) & (2) "or approval" and "or approved" language makes no sense.

In Rex Trailer, the Supreme Court construed what it considered "essentially equivalent" provisions under the Surplus Property Act[5] that implemented a program for disposing of surplus war materials, giving World War II veterans a priority for purchasing surplus property.

Rex Trailer purchased five motor vehicles from the Government, fraudulently using the names of five persons possessing veteran priority rights. Rex Trailer admitted that it had committed the fraud, but contended, like Appellee in this case, that the United States had not

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[5] "The case of United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) involved a provision of the False Claims Act, R. S. 5438, 3490, 31 U.S.C. 231, essentially the equivalent of 26 (b) (1)." Rex Trailer Co. v. United States, 350 U.S. 148, 152 (1956).

been harmed because the Government was paid the same price for the vehicles by Rex Trailer as it would have been paid by veterans. The United States sought no actual damages and "limited itself to the recovery of the sum of $2,000 (the statutory penalty) for each of the five trucks". Id. at 150.

Rex Trailer contended that the failure of the Government to allege specific damages precluded recovery. Id. at 152. The Supreme Court held that "there is no requirement, statutory or judicial, that specific damages be shown . . ." Id., citing Marcus. The Court went on to itemize the injuries to the Federal Government -- *non-financial in nature* -- that justified imposition of statutory penalties: "It is obvious that injury to the Government resulted from the Rex Trailer Co.'s fraudulent purchase of trucks. It precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." Id. at 153.

Clearly, frustration of public policy objectives is enough of an injury to the government, and that no direct financial impact on the Treasury is necessary to assert a FCA claim, as long as there has been a

fraudulent claim to a government official and the United States government may suffer some harm or injury.

In United States ex rel. Schumer v. Hughes, 63 F.3d 1512, 1525 (9th Cir. 1995), the Court held "[a]lthough the Administrative Contracting Officer found that this noncompliance[6] had an 'immaterial impact' on costs[7], the lack of a determination of actual harm from the CAS[8] violation does not preclude a claim under the FCA. See, e.g., Rex Trailer Co. v. United States, 350 U.S. 148, 152 (1956); United States v. Kensington Hosp., 760 F.Supp. 1120, 1127 (E.D. Pa. 1991)(citing cases).

The Third Circuit Opinion in this case references and relies upon excepts from other FCA cases that refer to "claims for payment," but United States ex rel. Luther v. Consolidated Industries, 720 F.Supp 919, 923 (N.D. Ala. 1989) explains these cases that were really not about "claims for payment."

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[6] Hughes had inappropriately charged expenditures to the B-2 Bomber program that should have been charged to the F-15 Fighter program.

[7] "Audits conducted in 1990 and 1991 revealed that Hughes's pooling arrangement had actually saved the government money." Hughes at 1516.

[8] Cost Accounting Standards

"In United States v. Hibbs, 568 F.2d 347, 350 (3rd Cir. 1977), the court stated, 'it has been held that the making of a false certificate alone, does not entitle the government to the statutory forfeiture. There must have been a payment.' The court cited United States v. Mc Ninch, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed 2d 1001 (1958) and United States v. Tieger, 234 F.2d 589 (3rd Cir. 1956) for that proposition. In McNinch and Tieger, however, the focus was primarily on the issue of whether or not a 'claim' had been presented. Both cases deal with fraudulently procured government-insured loans in which a default had not yet occurred."

Frustration of, and interference with, the public policy objectives of the bankruptcy code[9] is just as much an injury to the U. S. Government as precluding "bona fide sales to veterans" and promoting "undesirable

[9] The U. S. Bankruptcy Code was enacted by Congress pursuant to Constitutional authority (see Article 1, Section 8). The public policy intent of the bankruptcy laws included (1) stopping harassing collection tactics and collection litigation, (2) providing a fresh start to debt-ridden individuals, (3) creating a structure wherein corporations and individuals can reorganize to pay their creditors, and (4) providing a fair and orderly process for the liquidation of estate assets and payment to creditors.

speculation" was in the Rex Trailer case, where no money was paid out of the treasury and the money paid by Rex Trailer for the vehicles was the same as would have been paid by an eligible veteran. Congress agrees. The Senate Report also stated that, "The cost of fraud cannot always be measured in dollars and cents, however . . . even in the cases where there is no dollar loss -- for example where a defense contractor certifies an untested part for quality yet there are no apparent defects -- the integrity of quality requirements in procurement programs is seriously undermined. S. Rep. at 3, reprinted in 1986 U.S.C.C.A.N. at 5268. So too here, the integrity and fairness of the bankruptcy laws have been undermined by the fraudulent actions of Appellee. The legislative history clearly establishes that the conduct prohibited by the FCA is much broader and more sophisticated than just overcharges. It stated that, "[c]laims may be false even though . . . services are provided as claimed if, for example, the claimant is ineligible to participate in the program . . ." S. Rep. at 9, reprinted in 1986 U.S.C.C.A.N. at 5274.

The Court of Appeals' holding that "the false claims act only prohibits fraudulent claims that cause or would

cause economic loss to the government" would impermissibly re-write the FCA statute, contradict prior decisions of the Supreme Court, disregard FCA legislative history, and overturn relied-upon case law from numerous appellate courts. Frustration of efforts by U.S. Bankruptcy Court judges and U.S. Trustee's Office personnel to implement and give effect to objectives of U. S. Bankruptcy Code by Appellee' submission of fraudulent fee applications to U. S. Bankruptcy Court and U. S. Trustee's Office for payment approval, caused FCA actionable economic harm to the U. S. Treasury.

The Court of Appeals' Opinion states that "[i]t is undisputed that the United States Trustee and the United States Bankruptcy Courts are government agents for the purposes of the False Claims Act." (A 9, Page 13). The Opinion further states, "it is clear that inflating the Westlaw and LEXIS expenses was unlawful under the Bankruptcy Code.[10]" (A 9, Page 13). If Appellee

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[10] Appellee admitted in its Answer to the whistleblower & defamation Complaint that it had used a 1.5 multiplier on Westlaw and Lexis expenses. (A 12, Page 2). The use of this 1.5 multiplier for billing on-line research charges had been established at Appellee's law firm "over 20 years ago." (A 11, Page 1). Appellee admitted that the 20-year practice of

submitted fee applications to the U. S. Bankruptcy Court and to the U. S. Trustee's Office that contained expenses that were not incurred, and that contained disguised charges for photocopies that were 20% higher than permitted, and if Appellee submitted falsely sworn documents to these government agents as to the accuracy of these "expenses," the Bankruptcy Courts and Trustee's Office would not be able to carry out their assigned tasks to implement the provisions of the U. S. Bankruptcy Code. If their efforts to implement and give effect to the U. S. Bankruptcy Code were frustrated by the fraudulent actions of Appellee, it cannot be denied that serious and substantial injury was done to the public fisc.

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using a 1.5 multiplier on Westlaw and Lexis expenses was terminated on January 1, 1996. (five months after Appellant's memo to DeLucia and three months after Appellant was terminated) (A 13, Page 1).

II. Estate Property Turned Over to Chapter 7 Trustees by Debtors for Disposition in Accordance with Provisions of the Bankruptcy Code, in Exchange for a Discharge of Debts, Becomes Government Property Subject to Provisions of FCA.

The legal status of the Chapter 7 bankruptcy estate appears to be an issue not previously addressed by a court. This Petition should be granted because, if the Supreme Court determines that Chapter 7 estate property is property of the government for FCA purposes, law firms and other professionals that submit inflated bills to the U.S. Bankruptcy Court for payment approval would be held accountable under the FCA. Appellee filed many false claims in Chapter 7 cases.

The Bankruptcy Code is an exclusive federal system that provides a framework for the fair and orderly process for the liquidation of bankruptcy estate assets and payment to creditors. In exchange for a discharge of most of the debtor's debts (11 U.S.C. § 727(b)), the debtor turns over all non-exempt property to a panel trustee. 11 U.S.C. § 542(a). Panel trustees are appointed by the U. S. Trustee's Office. 11 U.S.C. §§ 701(a)(1), 702. Panel trustees liquidate estate assets (11 U.S.C. §§ 363, 704(1), 725, 726), recover property to the estate

that was wrong fully conveyed to favored creditors (preferences) (11 U.S.C. § 547), or sold for less than its actual value (fraudulent transfers). 11 U.S.C. § 548(a). Panel trustee operate with broad federal powers given to insure that the policy objectives of the Bankruptcy Code are achieved. 11 U.S.C. § 544(a).

Chapter 7 estates are created automatically upon the filing of the petition pursuant to federal law. 11 U.S.C. § 541(a). Chapter 7 estates are administered by federally appointed officials. 28 U.S.C. § 586(a)(1), 11 U.S.C. §§ 323, 581(a). Assets of Chapter 7 estates are in the care, custody and control of federally appointed officials. 11 U.S.C. § 704, 28 U.S.C. § 586(a)(3). Controversies concerning Chapter 7 estates are adjudicated by federal bankruptcy judges in federal bankruptcy courts pursuant to the Bankruptcy Code. 11 U.S.C. §§ 105, 1112(b). Administration of Chapter 7 estates by panel trustees is monitored by the Office of the U. S. Trustee. 28 U.S.C. § 586(a)(1), 11 U.S.C. § 701(a)(1). The liquidated estate assets are paid to creditors by federally appointed Chapter 7 panel trustees in accordance with federal law. 11 U.S.C. § 726. Trustees submit applications for approval of the payment of their fees and actual and

necessary expenses to the Bankruptcy Court and U. S. Trustee's Office. 11 U.S.C. §§ 330, 331, 28 U.S.C. § 586(a)(3)(A). The panel trustee's fees and expenses cannot be lawfully paid without the concurrence of the U. S. Trustee and an Order (approving payment) by the Bankruptcy Court. 11 U.S.C. §§ 328, 330. Accordingly, for purposes of the FCA, assets of Chapter 7 bankruptcy estates must be considered to be federal property, and any fraudulent attempt to take bankruptcy estate assets would constitute an injury to the public fisc and violate the FCA.

III. The Court of Appeals Used the Incorrect Standard to Determine (1) if Appellant Was Engaged in Protected Conduct, (2) if Appellee Was Put on Notice of the Potential for False Claim Act Litigation, and (3) if Appellant was a Fraud Investigator for False Claims Act Purposes.

The Court of Appeals upheld the District Court holding that "Hutchins's investigation and reporting of the Westlaw and LEXIS billing practice was not 'protected conduct' because, plaintiff only looked into the firm's research costs because his supervisor, defendant DeLucia, asked him to. The memo and all

research involved, was therefore, the product of a specific assignment given to him by his supervisor. It was not the result of plaintiff's independent investigation prompted by a suspicion of fraud upon the government." (A 9, Page 27)

The Supreme Court should grant certiorari on this issue because this holding by the Court of Appeals conflicts with the FCA's statutory language, with case law on this point, and with the facts of this case. The Court's holding is far more restrictive and narrow than intended by Congress, and if left to stand, will have a chilling effect on other potential qui tam relators.

The Court of Appeal correctly stated, "[a]t issue here is whether Hutchins engaged in 'protected conduct,' and whether Wilentz, Goldman & Spitzer was on notice that he was pursuing (i.e., acting in furtherance of) a False Claims Act suit and retaliated against him." (A 9, Page 26). The Court's premise, however, is incorrect. Appellant was directed by DeLucia to confirm a Lexis billing entry on a Fee Application to be submitted to the Bankruptcy Court for payment approval. Appellant was not directed to investigate a fraudulent billing scheme that Appellee had implemented more than 20 years

earlier. (A 11, Page 1). Appellant inadvertently learned of the billing fraud and of the mechanism used (the 1.5 multiplier) to perpetuate this fraud. So while performing one task (verifying the accuracy of a single billing entry on a fee application), Appellant discovers that the firm had an institutionalized billing fraud system. This act and these facts do not disqualify Appellant as a qui tam relator, or prevent his investigation efforts from being classified as "protected conduct."

In U.S. ex rel. Yesudian v. Howard University et al., 153 F.3d 731 (D.C. Cir. 1998), the Court held that the protected conduct element of §3730(h) "does not require the plaintiff to have developed a winning qui tam action before he is retaliated against," but rather, "it is sufficient that a plaintiff be investigating matters that "reasonably could lead" to a viable False Claims Act case." By way of clarification, the Court added that "an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations" is not enough, but rather the §3730(h) plaintiff's investigation "must concern 'false or fraudulent' claims." Appellant's complaints and investigation related to fraudulent billing of bankruptcy

estates, not regulatory non-compliance or accidental over-charges. The Yesudian Court also held that an individual need not know that the false claims or fraudulent billing investigation he was pursuing could lead to a FCA qui tam suit, for "[a]n initial investigation may well further an action under the Act, even though the employee does not know it at the time of the investigation." Such a standard would make it unnecessary for Appellant to warn Appellee of the potential for FCA litigation. According to the Court, if the rule were otherwise, "only lawyers - or those versed in the law - would be protected by the statute." In this case, the individuals put on notice by Appellant were knowledgeable, skilled and professional attorneys. Lastly, the D.C. Circuit rejected the district court's contention that a §3730(h) plaintiff must have suggested to his employer that he was contemplating an FCA action or told or threatened his employer that he would report his allegations to the Government.

The Yesudian court then went on to distinguish that case from three other §3730(h) claims that were dismissed - U.S. ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996). U.S. ex rel. Ramseyer v. Century

Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996), and Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994). In each of these three cases the plaintiff's had not made allegations of fraud, but rather had alleged regulatory non-compliance and/or that their intra-corporate complaints were indistinguishable from their regular job duties (i.e., as a contract administrator in Robertson). In Yesudian, the plaintiff had regularly complained about falsified time and attendance records, the acceptance of bribes, and the payment of vendors who did not provide services to Howard University. The plaintiff's supervisor, who terminated plaintiff, was aware of plaintiff's complaints. Like the Yesudian case, Appellant's supervisors, DeLucia and Gardner, both were aware of his memo regarding the billing of inflated Westlaw and Lexis expenses, and of his protests regarding instructions to engage in fraudulent and unethical billing practices.

The August 2, 1995 memo to DeLucia (A 14, Page 10) was "protected conduct, and it put Appellees on notice of the possibility of a FCA suit. Appellant's subsequent efforts to discuss the memo with DeLucia was also "protected conduct." Appellees' actions in

immediately investigating, and then discontinuing, a twenty-year practice of up-charging expenses billed to clients shows conclusively that Appellees knew what the implications of Appellant's memo to DeLucia were. (A 11, Page 1, and A 13, Page 1). This memo did more than report the verification of a billing entry. This memo demonstrated that Appellant was in possession of knowledge that Appellees were submitting fraudulent claims to the Bankruptcy Court for payment approval. As experienced and knowledgeable partners in one of the state's oldest and largest law firms, Appellees knew FCA litigation was a possibility – thereby making Appellant's conduct protected.

The Court of Appeals erred when it held that Appellant did not put the Appellees on notice of the potential for FCA litigation. (A 9, Page 48). The Supreme Court should grant certiorari on this issue because the standard used by the Court of Appeals is so narrow that it will discourage employees from reporting fraud against the government, and thereby frustrate the public policy objectives of Congress.

Appellant's August 2, 1995 memo to DeLucia and his subsequent efforts to discuss the 1.5 multiplier with

DeLucia, Appellant's complaints to the paralegal supervisor, Appellant's complaints to his project supervisor, and Appellant's October 2, 1995 request to the firm's accounting department for PT&E expense reports on numerous bankruptcy cases, collectively constitute sufficient evidence from which a fact finder could reasonable conclude that Appellant was engaged in protected conduct and that Appellees were on notice of the probability that a qui tam action would be filed by Appellant.

Appellee's Management Committee met on August 29, 1995, (27 days after Appellant transmits the memo to DeLucia regarding use of a 1.5 multiplier on Lexis & Westlaw charges) to discuss the firms "disbursement recovery charges" for photocopies and on-line research (A 13, Pages 3-4). On November 8, 1995, Appellee's Management Committee decided to reduce the fees it charged for photocopies and to eliminate the use of a 1.5 multiplier for billing on-line research charges (A 13, Pages 2-4). On January 1, 1996, the practice of using a 1.5 multiplier for billing on-line research charges was discontinued (A 13, Page 1). The use of this 1.5 multiplier for billing on-line research charges had been

established at Appellee's law firm "over 20 years ago." (A 11, Page 1). From these facts, a jury could reasonably and fairly conclude that Appellant was engaged in "protected conduct," and that Appellee was on notice of the distinct possibility of FCA litigation.

The Court of Appeals affirmed the U.S. District Court holding that Appellant's conduct was "very similar" to the plaintiffs in Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994), and United States ex rel. Ramseyer v. Century Healthcare Corporation, 90 F.3d 1514 (10th Cir. 1996). (A 6, Page 13). The Court held that Appellant only looked into the firm's billing matters at the direction of DeLucia, and that a higher standard would be used to determine if Appellant took actions that were protected under the FCA. The Court also found that "Hutchins never informed his supervisors he believed this billing practice was 'illegal,' Ramseyer , 90 F.3d at 1523, or that the practice was fraudulently causing government funds to be lost or spent. Robertson, 32 F .3d at 951. Nor did he advise his employer that corporate counsel be involved

in the matter.[11] Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 869 (4th Cir. 1999)[12]. The Court concluded that Appellant was not engaged in protected conduct and that Appellee was not put on notice of the distinct possibility of FCA litigation.

The Supreme Court should grant certiorari on this issue because the holding of the Court of Appeals regarding who is a fraud investigator, and what standard is used to determine whether conduct is protected is in conflict with the statutory language of the FCA and the cases interpreting the statute. If this decision is allowed to stand, confusion will grow as to whether an individual may lack standing to file a qui tam action. This will frustrate the Congressional objectives set forth in the 1986 amendments to the FCA that included encouraging more individuals to report fraud against the government.

Appellant's conduct was not like the actions of Plaintiffs in Ramseyer or Robertson. Appellant's job

---

[11] DeLucia was a partner and creditor's rights department manager.

[12] Also holding that "If an employee is assigned the task of investigating fraud within the company, courts have held that the employee must make it clear that the employee's actions go beyond the assigned task [in order to allege retaliatory discharge under § 3730(h)]. Eberhardt at 868.

description did not include reporting fraud or monitoring, examining or reporting Appellee's compliance with the Bankruptcy Code, Bankruptcy Rules, or U.S. Bankruptcy Court Local Rules relating to the billing of costs. Appellant, in the prior 2.5 years of employment with Appellee's law firm, had never been instructed to verify an expense, and was never asked to look for or report fraud.

On this issue, the Court focused its attention on the subsequent memo that Appellant wrote to DeLucia explaining his discovery. The Court omitted all the actions taken by Appellant subsequent to writing the memo, including: numerous attempts to discuss the memo with DeLucia; complaints to the paralegal supervisor about being instructed to bill bankruptcy estates for performing secretarial tasks;[13] complaints to paralegal supervisor about being instructed to conduct, and bill bankruptcy estates for, needless Pacer

[13] Bankruptcy Court Rules do not permit the hourly billing of bankruptcy estates for secretarial time. Bankruptcy Courts have occasionally permitted billing for secretarial overtime in unusual circumstances.

research;[14] complaints to his project supervisor about billing bankruptcy estates for performing secretarial functions and performing unneeded Pacer research; and, on October 2, 1995, two hours before Appellant was terminated, requesting costs billing statements from the accounting office for fifteen bankruptcy cases to determine the extent of billing fraud as it applied to bankruptcy estates.

In Robertson, the plaintiff was a contract administrator for Bell Helicopter Textron. Ramsey was responsible for ensuring that the company's requests for government funding were verified. The district court's opinion noted that the Robertson court record contained "no evidence that Robertson expressed any concerns to his supervisors other than those typically raised as part of a contract administrator's job," and that "the plaintiff's investigations and comments to his supervisors were all actions consistent with the performance of his employment duties." The Fifth Circuit found that Robertson's actions were not protected activity. In this

[14] Approximately 70 of these cases had been dormant for more than six months. Weekly Pacer reports increased the amounts sought by Appellee on their fee applications, but conferred no benefit upon the estate.

case, however, Appellant had never expressed concerns about fraudulent billing until August 2, 1995. His complaints thereafter and his investigations were not consistent with any of his duties or job description prior to August 2, 1995.

In Ramseyer, where the plaintiff regularly advised her supervisors regarding Century Healthcare's noncompliance with Medicaid requirements, the Tenth Circuit found that her reporting did not "rise to an allegation that plaintiff performed either an 'investigation for,' or 'provided assistance in,' this or any other FCA action," and that "the monitoring and reporting activities described in plaintiff's complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties. Id. at 1523.

The point these two cases make is of no relevance in Appellant's complaint against Appellee, and provided the court with no basis to grant summary judgment. There is no evidence, or even an obscure representation in the record, that Appellant's job description included monitoring and/or reporting Appellees' non-compliance with Bankruptcy Code billing requirements. The issues involved in Appellant's investigations and complaints

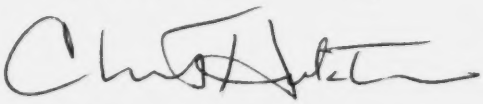
during the last two months of his employment at Appellees' law firm were not typical of, consistent with, or characteristic of his job description or duties performed for nearly three years in the Appellees' Creditors' Rights department. Appellant's actions were voluntary within the meaning of the "original source" requirement of the FCA.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Dated this 11th day of April 2002.

Respectfully submitted,



CHARLES T. HUTCHINS
Qui Tam Relator
Petitioner, Pro Se
5011 Marshall Road
Farmingdale, NJ 07727
(201 867-6700 x 221 (Days)
(732) 919-6981 (Evenings)

Nos. 98-6248 & 98-6339

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

UNITED STATES OF AMERICA,
ex rel. CHARLES T. HUTCHINS, Petitioner

v.

WILENTZ, GOLDMAN & SPITZER, Respondent

CHARLES T. HUTCHINS, Petitioner

v.

WILENTZ, GOLDMAN & SPITZER, Respondent

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES T. HUTCHINS, ESQ.
Qui Tam Relator, Petitioner, Pro Se
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6248 & 98-6339

CHARLES T. HUTCHINS
v.
WILENTZ, GOLDMAN & SPITZER;
LOUIS DeLUCIA;
JOHN DOES "1" THROUGH JOHN DOES "3";
JOAN LAVERY

(Newark D.C. Civil No. 96-4678)

CHARLES T. HUTCHINS
v.
ABC CORP., SEALED

(Newark D.C. Civil No. 96-5988)

Charles T. Hutchins
Appellant

(D.C. Civ. Nos. 96-cv-04678 & 96-cv-05988)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, McKEE, RENDELL, AMBRO,
FUJENTES and STAFLETON*, Circuit Judges

---

* As to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

_____
CIRCUIT JUDGE

Dated: **NOV 8 – 2001**
ch/cc: CTH
DHD
DNL
MER
MEM

Filed August 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6248 & 98-6339

CHARLES T. HUTCHINS

v.

WILENTZ, GOLDMAN & SPITZER;
LOUIS DeLUCIA;
JOHN DOES "1" THROUGH JOHN DOES "3";
JOAN LAVERY

(Newark D.C. Civil No. 96-4678)

CHARLES T. HUTCHINS

v.

ABC CORP., SEALED

(Newark D.C. Civil No. 96-5988)

Charles T. Hutchins,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-04678 & 96-cv-05988
(Honorable Katharine S. Hayden)

Argued February 8, 2001

Before: SCIRICA, McKEE and STAPLETON, Circuit Judges

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion in the above case, filed June 13, 2001, be amended as follows:

Page 2, lines 5-6 of the introductory paragraph, which read:

"fraudulent claims that cause economic loss to the government."

shall read:

"fraudulent claims that cause or would cause economic loss to the government."

Page 8, lines 1-6, which read:

"Claims Act a plaintiff must prove: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; (3) the defendant knew the claim was false or fraudulent; and (4) the United States suffered damages as a result of the false or fraudulent claim."

shall read:

"Claims Act a plaintiff must prove: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent."

Page 8, lines 14-17, which read:

"The crux of the dispute is whether the submission of these fraudulent bills was a `false claim for payment or approval' that caused damage to the United States government."

shall read:

"The crux of the dispute is whether the submission of these fraudulent bills was a `false claim for payment or approval.' "

Page 8, lines 18-19, which read:

"Hutchins contends that even if no government money were expended from the United States Treasury in connection"

shall read:

"Hutchins contends that even if no claim were made against United States Treasury money in connection"

Page 8, line 32, which reads:

"does not cause the government economic loss"

shall read:

"would not cause the government economic loss"

Page 9, line 19. Before the sentence beginning, "As the Supreme Court recognized," insert:

"While `recovery under the [False Claims Act] is not dependent upon the government's sustaining monetary damages,' Varljen v. Cleveland Gear Co., Inc., 250 F.3d 426, 429 (6th Cir. 2001), the Act is only intended to cover instances of fraud `that might result in financial loss to the Government.' Neifert-White, 390 U.S. at 232."

Page 10, line 20, which reads:

"which causes economic loss to the United States"

shall read:

"which attempts to or actually causes economic loss to the United States"

Page 11, lines 1-4, which read:

"For these reasons, we hold the submission of false claims to the United States government for approval which do not cause financial loss to the government are not within the purview of the False Claims Act."

shall read:

"For these reasons, we hold the submission of false claims to the United States government for approval which do not or would not cause financial loss to the government are not within the purview of the False Claims Act."

Page 11, line 9, which reads:

"these claims result in economic loss to the United States"

shall read:

"these claims would result in economic loss to the United States"

Page 12, line 16, which reads:

"caused economic loss to the United States Treasury."

shall read:

"caused or would cause economic loss to the United States Treasury."

BY THE COURT:

/s/ Anthony J. Scirica
Circuit Judge

DATED: August 16, 2001

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6248 & 98-6339

CHARLES T. HUTCHINS

v.

WILENTZ, GOLDMAN & SPITZER;
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JOHN DOES "1" THROUGH JOHN DOES "3";
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(Newark D.C. Civil No. 96-5988)

Charles T. Hutchins,
Appellant

On Appeal from the United States District Court
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D.C. Civil Action Nos. 96-cv-04678 & 96-cv-05988
(Honorable Katharine S. Hayden)

Argued February 8, 2001

Before: SCIRICA, McKEE and STAPLETON, Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on February 8, 2001.

On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the Orders of the District Court entered August 5, 1998, and September 9, 1998, be, and the same are hereby AFFIRMED. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST

Chief Deputy Clerk

DATED: June 13, 2001

Certified as a true copy and Reissued in lieu of a formal mandate on November 16, 2001

Teste:

Clerk, U.S. Court of Appeals
For the Third Circuit

Filed June 13, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6248 & 98-6339

CHARLES T. HUTCHINS

v.

WILENTZ, GOLDMAN & SPITZER;
LOUIS DeLUCIA;
JOHN DOES "1" THROUGH JOHN DOES "3";
JOAN LAVERY

(Newark D.C. Civil No. 96-4678)

CHARLES T. HUTCHINS

v.

ABC CORP., SEALED

(Newark D.C. Civil No. 96-5988)

Charles T. Hutchins,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-04678 & 96-cv-05988
(Honorable Katharine S. Hayden)

Argued February 8, 2001

Before: SCIRICA, McKEE and STAPLETON, Circuit Judges

(Filed: June 13, 2001)

CHARLES T. HUTCHINS (ARGUED)
5011 Marshall Road
Farmingdale, New Jersey 07727

Appellant, Pro Se

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Louis DeLucia, Joan Lavery

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Attorneys for Amicus Curiae-
Appellant, United States of America

OPINION OF THE COURT

SCIRICA, Circuit Judge.

The principal issue on appeal is whether the submission of fraudulent legal bills for approval to the United States Bankruptcy Court violates the False Claims Act, 31 U.S.C. S 3729. We hold the False Claims Act only prohibits fraudulent claims that cause economic loss to the government. We also hold that a retaliatory discharge cause of action under 31 U.S.C. S 3730(h) requires proof that the employee engaged in "protected conduct" and that the employer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against the employee.

I.

Charles Hutchins was one of two paralegals in the creditors' rights department of the New Jersey law firm of Wilentz, Goldman & Spitzer from March 1993 to October 1995. On August 2, 1995, Louis T. DeLucia, a partner in Wilentz, Goldman & Spitzer's creditors' rights

department, asked Hutchins to investigate certain client bills, with particular attention to the "high costs" of certain computerized research. After investigating the matter and discussing it with the law firm's paralegal supervisor, Marie Henneberry, Hutchins submitted a short memorandum to DeLucia stating, "I was told that the firm has a policy whereby actual Westlaw and LEXIS expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for." Hutchins also expressed concern to Henneberry that paralegals were being used to perform secretarial tasks resulting in overcharging clients.

On September 22, 1995, over a month after submitting his billing practices memorandum, Hutchins was summoned by firm management to a meeting to discuss his continued employment. Hutchins contends the law firm wanted to fire him because of his "investigation" into their fraudulent billing practices. Wilentz, Goldman & Spitzer countered they were upset over Hutchins's relationships with other firm employees, and wanted to discuss an anonymous memorandum

circulated in May 1995 containing disparaging comments about Andrew Wagner, the other paralegal in the creditors' rights department. The law firm advised Hutchins that they believed he wrote the memorandum. After denying involvement, Hutchins wrote a letter to Kim Haan, a paralegal in another department whom he believed was the source of the accusation, stating,

> You considered my prior uses of guerilla tactics against the I.R.S., my ex-wife and her attorneys as evidence that I wrote the . . . [disparaging memorandum]. The I.R.S. has stolen my money, locked me up in court battles for a decade, ruined a relationship/marriage engagement, harassed me and filed hundreds of thousands of dollars in tax liens against me. My ex-wife and her attorneys used perjured testimony and affidavits to induce the government courts to issue restraining orders keeping me away from my children. There just is no comparison between these interferences with my money and my kids, and someone propositioning a married woman in the office . . . . After you've read

Atlas Shrugged two or three more times (I've read it five times) you may recognize Rand's belief that free men have a moral duty to resist abuses of government and to resist the efforts of those who misuse government agencies and government power for personal reasons. Her philosophy guides my subtle warfare against tyrants. Its [sic] a great deal more appropriate than blowing up federal buildings . . . .

I suppose I would hope that if you learn anything from all of this it would be not to be so quick to rush to judgment about people . . . and that you would be careful about what you say about people. The next time you might injure someone less prepared to deal with abuse, or the person you injure just might file a defamation/slander lawsuit against you.

Haan reported to the firm personnel manager, Anne Riegle, that she was "terrified" by the letter. Riegle noted that Haan was "visibly upset" believing that Hutchins might "do something to her." On Friday,

September 27, 1997, the law firm decided to terminate Hutchins as a result of "the culmination of escalating problems with his superiors and with staff."

When informed of the decision to terminate Hutchins, Haan asked the law firm to wait until after the weekend to inform him. Because she was taking the law school admission test that weekend, Haan explained that she was afraid Hutchins would attempt to disrupt her. She also asked to be excused from work the following Monday and Tuesday so that she would not be present when Hutchins was discharged. Wilentz, Goldman & Spitzer agreed.

On Monday, October 2, 1995, Hutchins requested files from the accounting department reflecting the law firm's billing of Westlaw and LEXIS expenses. The accounting department denied him access. Two hours later, Hutchins was informed that he was fired.

On October 18, 1995, Hutchins notified the United States Trustee by sworn affidavit that he believed Wilentz, Goldman & Spitzer had engaged in fraudulent and unlawful billing practices. He filed a pro se qui tam

complaint under S 3729 of the False Claims Act alleging Wilentz, Goldman & Spitzer submitted fraudulent billing statements to the United States Bankruptcy Court and that the law firm violated the whistleblower provisions of the False Claims Act, 31 U.S.C. S 3730(h), by terminating his employment because of his investigation into the firm's billing practices.

The District Court dismissed Hutchins's qui tam claim under Fed. R. Civ. P. 12 (b)(6),[1] and granted Wilentz, Goldman & Spitzer summary judgment on Hutchins's retaliatory discharge claim.[2]

II.

The District Court had jurisdiction over Hutchins's qui tam and retaliatory discharge claims under 28 U.S.C. S 1331. We have jurisdiction over the District Court's

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[1]United States ex rel. Hutchins v. Wilentz, Goldman & Spitzer, C.A. No. 96-5988, slip. op. at *4 (D.N.J. August 4, 1998) ("Hutchins I") (dismissing qui tam claim).

[2] United States ex rel. Hutchins v. Wilentz, Goldman & Spitzer, C.A. No. 96-5988, slip. op. at *15-16 (D.N.J. September 8, 1998) ("Hutchins II") (granting defendant summary judgment on retaliatory discharge claim).

final order dismissing his claims under 28 U.S.C.S 1291. We exercise plenary review over the District Court's grant of summary judgment on Hutchins's retaliatory discharge claim and its dismissal of his qui tam claim under Fed. R. Civ. P. 12 (b)(6). Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 822 (3d Cir. 1999); Malia v. Gen. Elec. Co., 23 F.3d 828, 830 (3d Cir.), cert. denied, 513 U.S. 956 (1994).

III.

A.

The False Claims Act provides:

(a) Liability for certain acts - Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses or causes to be made or used, a false record or statement to get a false claim

or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid,

* * *

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. S 3729. An action under the False Claims Act may be commenced in two ways. The United States Department of Justice may file suit to collect damages suffered as the result of fraudulent claims which cause

government money to be expended from the United States Treasury. Alternatively, a private plaintiff may bring a qui tam action[3] on behalf of the government to

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[3] In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000) (internal citations omitted), the United States Supreme Court set forth the historical foundations of the qui tam suit stating, "qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means `who pursues this action on Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone." The Court further explained,

> Qui tam actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interest.

Id. at 774 (internal citations omitted).

The Court noted that in the 14th century,

> Parliament began enacting statutes that explicitly provided for qui tam suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's) . . . and . . . those that allowed informers to obtain a

recover losses incurred because of fraudulent claims. 31 U.S.C. § 3730(b)(1). When a private plaintiff brings a qui tam action, the government is permitted to intervene. But the private plaintiff may continue his suit even if the government declines to intervene. 31 U.S.C. §3730(c)(1). If the qui tam suit is ultimately successful, the private plaintiff, known as a relator, is entitled to up to 30% of the funds the government recovers. 31 U.S.C. § 3730(d).

B.

Relying on the qui tam provisions of the False Claims Act, Hutchins filed suit alleging that Wilentz, Goldman & Spitzer's submission of inflated legal bills to the United States Bankruptcy Court violated §3729(a)(1)

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portion of the penalty as a bounty for their information (about those who transgressed against the king) even if they had not suffered the injury themselves.

Id. at 775 (internal citations omitted).

of the False Claims Act.[4] To establish a prima facie case under the False Claims Act a plaintiff must prove: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; (3) the defendant knew the claim was false or fraudulent; and (4) the United States suffer ed damages as a result of the false or fraudulent claim. Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994)(quoting Miller v. United States, 550 F .2d 17, 23 (Ct. Cl. 1977)). It is undisputed that the United States Trustee and the United States Bankruptcy Courts are government agents for purposes of the False Claims Act. Additionally, it is clear that inflating the Westlaw and LEXIS expenses was unlawful under the Bankruptcy Code.

---

[4] As noted, S 3729(a)(1) provides:

Any person who-

(1) knowingly presents, or caused to be presented, to an officer or employee of the United States Government, or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable . . . .

The crux of the dispute is whether the submission of these fraudulent bills was a "false claim for payment or approval" that caused damage to the United States government. Focusing on the latter portion of §3729(a)(1), Hutchins contends that even if no government money were expended from the United States Treasury in connection with the law firm's inflated legal bills, the submission of these bills for approval by the Bankruptcy Court violates the False Claims Act.

Although not linguistically implausible, we find no support for this reading from the jurisprudence interpreting the False Claims Act. Rainwater v. United States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims."); United States ex rel. Marcus v. Hess, 317 U.S. 537, reh'g denied, 318 U.S. 799 (1943). Nor have we been able to find any case establishing that a false statement to the government which does not cause the government economic loss gives rise to False Claims

Act liability. United States ex r el. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir . 1996) ("[T]he Act attaches liability, not to underlying fraudulent activity, but to the `claim for payment.' ") (quoting United States v. Rivera, 55 F.3d 703, 709 (1st Cir . 1995)), cert. denied, 519 U.S. 1115 (1997).

"Not all false statements made to the federal government are claims within the meaning of the False Claims Act." United States v. Greenberg, 237 F. Supp. 439, 442 (S.D.N.Y. 1965) (citing United States v. Howell, 318 F .2d 162 (9th Cir. 1963)). "Even under a somewhat broader definition, only `actions which have the purpose and effect of causing the government to pay out money are clearly `claims' within the purpose of the Act.' " United States v. Lawson, 522 F. Supp. 746, 750 (D.N.J. 1981) (quoting United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), aff 'd, 515 F.2d 505 (2d Cir. 1975)); see also United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (False Claims Act reaches to "all fraudulent attempts to cause the Government to pay out sums of money."). As the

Supreme Court recognized in United States v. McNinch, 356 U.S. 595, 599 (1958) (quoting United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956)), " `The conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " In McNinch, the Supreme Court traced the legislative history of the False Claims Act stating,

> The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government.

Id. at 599; see also United States ex r el. Pogue v. Am. Healthcorp., Inc., 914 F.Supp. 1507, 1512 (M.D.Tenn. 1996)("The legislative history of the False Claims Act reveals that it was designed to protect the Federal Treasury.") (citing S. Rep. No. 99-345 at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269).

In this regard, we believe Hutchins's reading of the statute expands the False Claims Act's scope of liability to include actions not contemplated by Congress. His argument neglects the statutory definition of the term "claim" which provides,

> For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. S 3729(c).

The False Claims Act seeks to redress fraudulent activity which causes economic loss to the United States government. As the Supreme Court held in Hess, the purpose of the False Claims Act "was to provide for restitution to the government of money taken from it by fraud." 317 U.S. at 551. It was not intended to impose liability for every false statement made to the government.[5] Costner v. URS Consultants, Inc., 153 F .3d 667, 677 (8th Cir. 1998) ("[O]nly those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered `claims' within the meaning of the FCA.").

[5] Extending the False Claims Act to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine and essentially permit any plaintiff to sue on behalf of the government when false or misleading statements are made to any government agent including the courts, the legislature or any law enforcement officer.

For these reasons, we hold the submission of false claims to the United States government for approval which do not cause financial loss to the government are not within the purview of the False Claims Act. Tieger , 234 F.2d at 592. ("The provision relating to the payment or approval of a `claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government."). Unless these claims result in economic loss to the United States government, liability under the False Claims Act does not attach. United States v. Bornstein, 423 U.S. 303, 309 n.4 (1976) ("`The conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' ") (quoting McNinch, 356 U.S. at 599).

C.

In dismissing plaintiff 's claims, the District Court stated the Bankruptcy Court was merely acting as an intermediary in approving defendant's false claims. The court noted, "[In most False Claims Act actions] the

intermediary [to whom the defendants submitted false claims] has control over government funds for the purpose of properly reimbursing a non-fraudulent party, and the suit is filed because the funds wind up in the hands of an improper claimant." Hutchins I, slip. op. at *4. The District Court noted that the Bankruptcy Court, as intermediary, did not have similar control over the funds. Permitting this claim, said the District Court, would mean the False Claims Act would "apply whenever an individual submits a government-approved false claim to a third party who happens to owe an unrelated debt to a government agency." Id. at *4-5.

In its amicus curiae brief, the government contends the District Court improperly implied that a False Claims Act plaintiff who alleges the defendant caused an intermediary to submit a false claim on its behalf must establish that the intermediary had control over the government funds. To the extent the District Court's opinion implies an "intermediary control" requirement, we agree with the government that the District Court

erred. The proper inquiry under the False Claims Act is not whether an intermediary controls government funds for any period of time but whether the defendant causes, or will cause, the intermediary to make a false claim against the government resulting in a financial loss to the treasury. See, e.g., Neifert-White Co., 390 U.S. at 233; Rainwater, 356 U.S. at 591. Several cases recognize that a plaintiff may assert a cause of action under the False Claims Act even when an intermediary, such as a subcontractor, is merely a conduit to the transfer of government funds. See, e.g., Bornstein, 423 U.S. at 309; United States v. Ueber, 299 F.2d 310, 313 (6th Cir. 1962). The intermediary need not have discretion over, or even possession of, the government funds to establish that the defendant violated the False Claims Act. Therefore, we reiterate that the proper inquiry under the False Claims Act is whether the defendant made fraudulent claims that caused economic loss to the United States Treasury.

D.

On appeal, Hutchins contends Wilentz, Goldman & Spitzer's submission of fraudulent legal bills to the Bankruptcy Court constitutes a reverse false claim in violation of S 3729(a)(7). He argues that if the government were a creditor to a bankrupt estate, it would suffer "economic loss" by reason of the estate paying inflated legal bills.

The False Claims Act recognizes that a party may be liable for a reverse false claim if he "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). But in his complaint, Hutchins never asserted a reverse false claim cause of action under 31 U.S.C. § 3729(a)(7), nor did he allege the government was a creditor in any of the bankrupt estates in which Wilentz, Goldman & Spitzer submitted inflated legal bills.

As noted, the District Court dismissed Hutchins's claim on a Fed. R. Civ. P. 12(b)(6) motion. Our review

therefore is limited to reviewing the claims alleged in his complaint.[6] Because Hutchins did not plead this cause of action, nor file a motion to amend his complaint to raise this cause of action, we will not address his reverse false claim argument on appeal.

IV.

Hutchins also alleges that Wilentz, Goldman & Spitzer fired him in retaliation for his investigation and reporting of fraud in violation of 31 U.S.C. S 3730(h). Section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on

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[6] See, e.g., Mahone v. Addicks Utility Dist. of Harris County, 836 F.2d 921, 935 (5th Cir. 1988) ("It is black-letter law that `[a] motion to dismiss for failure to state claim under Federal Rule Civil Procedure 12(b)(6) is to be evaluated only on the pleadings.' ") (quoting Jackson v. Procunier, 789 F.2d 307, 309 (5th Cir. 1986)); see also 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure S 1356 (2d ed. 1990).

behalf of the employee or others in furtherance of an action under this section, including investigation for, initiating of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

This so called "whistleblower" provision protects employees who assist the government in the investigation and prosecution of violations of the False Claims Act. Neal v. Honeywell Inc., 33 F.3d 860, 861 (7th Cir. 1994). Congress enacted § 3730(h) "to encourage any individuals knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. "[F]ew individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." Id. at 5300. Therefore, S 3730(h) broadly protects employees who assist the government in prosecuting and investigating False Claims Act violations.

A plaintiff asserting a cause of action under § 3730(h) must show (1) he engaged in "protected

conduct," (i.e., acts done in furtherance of an action under § 3730) and (2) that he was discriminated against because of his "protected conduct." United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5300). In proving that he was discriminated against "because of " conduct in furtherance of a False Claims Act suit, a plaintiff must show that (1) his employer had knowledge he was engaged in "protected conduct"; and (2) that his employer's retaliation was motivated, at least in part, by the employee's engaging in "protected conduct."[7] Id.; see

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[7] The requirement that employers have knowledge that an employee is engaged in "protected conduct" ensures that § 3730(h) suits are only prosecuted where there has been actual retaliation. Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir. 1994) (quoting S. Rep. No. 99-345, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300), cert. denied, 513 U.S. 1154 (1995). As the Court of Appeals for the Seventh Circuit has noted, knowledge on the part of the employer is necessary because, Some employees will cry "fraud" to make pests of themselves, in the hope of being bought off with higher salaries or more desirable assignments. Others will perceive the disappointments of daily life as "retaliation" and file suits that have some settlement value because of the high costs of litigation and the possibility of error.

Neal, 33 F.3d at 863.

also Zahodnick v. Int'l Bus. Machines Corp., 135 F .3d 911, 914 (4th Cir. 1997). At that point, the burden shifts to the employer to prove the employee would have been terminated even if he had not engaged in the protected conduct. Mikes v. Strauss, 889 F. Supp. 746, 754 (S.D.N.Y. 1995).

At issue here is whether Hutchins engaged in "protected conduct," and whether Wilentz, Goldman & Spitzer was on notice that he was pursuing (i.e., acting in furtherance of) a False Claims Act suit and retaliated against him. Hutchins claims he engaged in three activities that were "protected conduct" that put his employer on notice that he was investigating and pursuing a potential False Claims Act suit. First, he cites the memorandum he wrote to Louis DeLucia concerning the law firm's "practice" of overcharging clients for Westlaw and LEXIS research costs.

Second, he points to his inquiry to Marie Henneberry, the paralegal supervisor, about this billing practice as well as the practice of using paralegals to perform secretarial functions resulting in inflated client

bills. Finally, he cites his request for billing documents from the accounting department.

In granting defendant's motion for summary judgment, the District Court found Hutchins failed to engage in "protected conduct" and that Wilentz, Goldman & Spitzer was not on notice of potential False Claims Act litigation when it fired him. The court found Hutchins's investigation and reporting of the Westlaw and LEXIS billing practice was not "protected conduct" because, plaintiff only looked into the firm's research costs because his supervisor, defendant DeLucia, asked him to. The memo and all research involved, was therefore, the product of a specific assignment given to him by his supervisor. It was not the result of plaintiff 's independent investigation prompted by a suspicion of fraud upon the government. Hutchins II, slip. op. at *13. Additionally, the court stated,

> [T]he record is clear that at no point did plaintiff complain or express any objection to the firm's alleged policy of inflating research costs. He merely performed the limited billing research his supervisor

asked of him, wrote his findings down in an inter office memo, and submitted it to DeLucia.

Id. at *15. Finally the court stated

> [Hutchins] fail[ed] to establish facts that demonstrate he alerted his employer, or acted so as to put it on notice, that he was investigating alleged wrongdoings and might be reporting them. Plaintiff 's assertions that he knew about unlawful practices, standing alone, without facts to support a finding that defendant fired him in retaliation for investigating and possibly reporting what he discovered, do not constitute enough evidence to support his federal claim in this action.

Id. at *16.

A.

An employee must engage in "protected conduct" in order to assert a claim under § 3730(h). In addressing

what activities constitute "protected conduct," the "case law indicates that `protected [conduct]' requires a nexus with the `in furtherance of' prong of [a False Claims Act] action." McKenzie v. Bellsouth Telecomm., Inc., 219 F.3d 508, 515 (6th Cir. 2000). This inquiry involves deter mining "whether [plaintiff's] actions sufficiently furthered `an action filed or to be filed under' the [False Claims Act] and, thus, equate to `protected [conduct].' " Id. at 516. Section 3730(h) specifies that "protected conduct" includes "investigation for, initiating of, testimony for, or assistance in" a False Claims Act suit. 31 U.S.C. § 3730(h).

Determining what activities constitute "protected conduct" is a fact specific inquiry. But the case law indicates that "the protected conduct element . . . does not require the plaintiff to have developed a winning qui tam action . . . . It only requires that the plaintiff engage[ ] in `acts . . . in furtherance of an action under[the False Claims Act].' " Yesudian, 153 F.3d at 739 (quoting 31 U.S.C. § 3730(h)). Under the appropriate set of facts, these activities can include internal reporting and

investigation of an employer's false or fraudulent claims. Id. at 742 ("[It] would [not] . . . be in the interest of law-abiding employers for the [False Claims Act] to force employees to report their concerns outside the corporation in order to gain whistleblower protection. Such a requirement would bypass internal controls and hotlines, damage corporate efforts at self-policing, and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers."); see also Childree v. UAP/GA Chem, Inc., 92 F .3d 1140, 1146 (11th Cir. 1996), cert. denied, 519 U.S. 1148 (1997); Hopper, 91 F.3d at 1269 ("[P]laintiff must be investigating matters which are calculated, or reasonably could lead to a viable [False Claims Act] action."); Neal, 33 F.3d at 864. "Mere dissatisfaction with one's treatment on the job is not, of course, enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." Yesudian, 153 F.3d at 740 (citing Hopper, 91 F.3d at 1269); see also Zahodnick, 135 F.3d at 914 ("Simply reporting his

concern of a mischarging to the government to his supervisor does not suffice to establish that Zahodnick was acting `in furtherance of' a qui tam action."); United States ex r el. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1523 (10th Cir. 1996).

As noted, employees need not actually file a False Claims Act suit to assert a cause of action under § 3730. Requiring an employee to actually file a qui tam suit would blunt the incentive to investigate and report activity that may lead to viable False Claims Act suits. The False Claims Act was enacted to encourage parties to report fraudulent activity and was intended to "protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together ." Yesudian, 153 F.3d at 740 (citing Neal, 33 F .3d at 864).

B.

As noted, the False Claims Act also requires employees to prove they were discriminated against "because of " their "protected conduct." To meet this

requirement, a plaintiff must show his employer had knowledge that he was engaged in "protected conduct" and that the employer retaliated against him because of that conduct. Several courts of appeals have held that the knowledge prong of § 3730 liability requires the employee to put his employer on notice of the "distinct possibility" of False Claims Act litigation. Yesudian, 153 F.3d at 740; Childree, 92 F.3d at 1146; Hopper, 91 F.3d at 1269; Neal, 33 F.3d at 864. We agree with this formulation.

An employer's notice of the "distinct possibility" of False Claims Act litigation is essential because without knowledge an employee is contemplating a False Claims Act suit, "there would be no basis to conclude that the employer harbored [§ 3730(h)'s] prohibited motivation [i.e., retaliation]." Mann v. Olsten Certified Healthcare Corp., 49 F. Supp.2d 1307, 1314 (M.D. Ala. 1999). Courts have recognized "the kind of knowledge the [employer] must have mirrors the kind of activity in which the [employee] must be engaged. What [the

employer] must know is that [the employee] is engaged in protected activity .. . -- that is, in activity that reasonably could lead to a False Claims Act case."[8] Yesudian , 153 F.3d at 742.

"Merely grumbling to the employer about job dissatisfaction or regulatory violations does not satisfy the requirement - just as it does not constitute protected conduct in the first place." Id. at 743. As one court has stated, the inquiry into whether an employee puts his employer on notice is

> [w]hether the employee engaged in conduct from which a fact finder could reasonably conclude that the employer could have feared that the employee was contemplating filing a qui-tam action against it or reporting the employer to the government for fraud . . . . [L]itigation . . . [is] a "distinct possibility" only if

[8] We note that the "protected conduct" and notice requirements are separate elements of a prima facie case of retaliation under § 3730. But as several circuits have recognized, the inquiry into these elements involves a similar analytical and factual investigation. See, e.g., Yesudian, 153 F.3d at 742.

the evidence reasonably supports such fear; if the evidence does not support this fear, litigation would not have been a distinct possibility.

Mann, 49 F. Supp.2d at 1314; see also McKenzie, 219 F.3d at 514-15; Yesudian, 153 F.3d at 741-45; Neal, 33 F.3d at 863-865.

Whether an employer is on notice of the "distinct possibility" of False Claims Act litigation is also a fact specific inquiry. While "[a]n employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation," Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir.), cert. denied, 528 U.S. 1038 (1999), the employer is on notice of the "distinct possibility" of litigation when an employee takes actions revealing the intent to report or assist the government in the investigation of a False Claims Act violation.

C.

1.

In most retaliation cases under §S 3730(h), the two critical questions are (1) what sort of activity constitutes "protected conduct," and (2) whether the employer was on notice that the employee was engaging in "protected conduct."[9] Because the inquiry into these questions is intensely factual, we will examine reported cases that review whether an employee engaged in "protected conduct" and whether this conduct was sufficiently linked to the investigation of a False Claims Act suit that it put the employer on notice of the "distinct possibility" of litigation.

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[9] As noted a prima facie case of retaliation under § 3730 requires proof that the plaintiff (1) engaged in "protected conduct," (i.e., acts done in furtherance of an action under § 3730) and (2) that the plaintiff 's employer discriminated him because of his "protected conduct." In proving that he was discriminated against "because of " his activities in furtherance of a False Claims Act suit, a plaintiff must show that (1) his employer had knowledge that he was engaged in "protected conduct"; and (2) that his employer's retaliation was motivated, at least in part, by the plaintiff 's engaging in "protected conduct."

In Neal, 33 F.3d 860, an employee who worked at the Joliet Army Arsenal Plant concluded her co-workers were falsifying ammunition test data reports. She reported this activity to her supervisor and to her employer's office of legal counsel. The employer's legal counsel then notified the United States Army which conducted an investigation and found plaintiff 's fraud allegations were true. The Court of Appeals for the Seventh Circuit found the plaintiff engaged in "protected conduct" and put her employer on notice of the "distinct possibility" of False Claims Act litigation when she reported the fraud to her employer's legal counsel. Specifically, the court noted that plaintiff "conducted her own investigation and reported her findings through corporate channels, leading to two additional investigations: one by [the defendant] and a second by the Army." Id. at 865.

In Yesudian, 153 F.3d 731, the Court of Appeals for the D.C. Circuit found an employee of Howard University who worked in the purchasing department engaged in "protected conduct" when he reported to

upper-level University officials that his supervisor was engaged in fraudulent activity. The plaintiff reported, among other things, that his supervisor submitted false time and attendance records, received bribes from vendors, and made payments to vendors who did not provide services to the University. The court held the plaintiff engaged in "protected conduct" and put the University on notice of the "distinct possibility" of a False Claims Act suit because he repeatedly advised his superiors that he had evidence of false records. He wrote several letters to his supervisors and to the University President and Vice-President detailing what he believed was illegal conduct that fraudulently resulted in the loss of government money. He also collected evidence from employees to corroborate his claims and took photographs of evidence. The Court of Appeals for the D.C. Circuit held these reporting actions put the University administration, and plaintiff 's immediate supervisors, on notice of the "distinct possibility" of False Claims Act litigation. Id. at 744-45; see also Hopkins v. Actions, Incorp. of Brazoria County, 985

F.Supp. 706, 709-10 (S.D.T ex. 1997) (holding plaintiff who reported to chairman of company that employees were illegally using Medicare funds for payroll costs, as well as informed him that she intended to report this activity to the government, engaged in "protected conduct" that put employer on notice of the "distinct possibility" of litigation).

Not all complaints by employees to their supervisors put employers on notice of the "distinct possibility" of False Claims Act litigation. In Robertson, 32 F .3d 948, the Court of Appeals for the Fifth Circuit found an employee did not engage in "protected conduct" nor did he put his employer on notice of potential False Claims Act litigation when he reported to his supervisors that the company was billing the government for various helicopter projects without properly substantiating the charges. The court noted the plaintiff "never used the terms `illegal,' `unlawful' or `qui tam action' in characterizing his concerns about [the] charges." Id. at 951; see also Mann, 49 F.Supp.2d at 1307.

In Zahodnick, 135 F.3d 911, the Court of Appeals for the Fourth Circuit found a managing engineer at

IBM whose job duties included assembling cost information for proposals to the Defense Intelligence Agency did not engage in "protected conduct" and failed to put his employer on notice of the "distinct possibility" of a False Claims Act suit. In Zahodnick, plaintiff engineer reported to his supervisor that employees were overcharging the government for the amount of time they worked on government projects. The court stated,

> The record discloses that Zahodnick merely informed a supervisor of the problem and sought confirmation that a correction was made; he never informed anyone that he was pursuing a qui tam action. Simply reporting his concern of mischarging to the government to his supervisor does not establish that Zahodnick was acting "in furtherance of " a qui tam action.

Id. at 914 (citing Robertson, 32 F .3d at 951).

Last year in McKenzie, 219 F.3d 508, the Court of Appeals for the Sixth Circuit held a dispatcher for BellSouth, whose regular job duties included processing

complaints about telephone service and closing "trouble reports" once telephone repairs were made, did not engage in "protected conduct" nor put her employer on notice of potential False Claims Act litigation when she complained to her supervisors that BellSouth was falsifying reports. It was BellSouth's policy that if repairs were not made within twenty-four hours of being reported, the customer was entitled to a refund for the period of time that telephone service was disrupted. Plaintiff alleged that various employees falsified time reports when outages were reported and when repairs were completed so that BellSouth could avoid paying reimbursements to customers, including several government agencies. Plaintiff complained to her supervisors about this practice and on one occasion showed her supervisor a newspaper article about a consumer fraud investigation by the Florida state attorney general. She also refused to falsify repair records. The court found the plaintiff did not engage in "protected conduct" reasoning that "when McKenzie brought her complaints to the attention of the BellSouth

auditor and her supervisors, legal action was not a reasonable or distinct possibility . . . because [her complaints were] not sufficiently connected to exposing fraud or false claims against the federal government." Id. at 516-17. The court stated the newspaper article McKenzie showed her supervisor "did not relate to a qui tam action and only discussed a consumer fraud investigation by the Florida state attorney general." Id. at 518. Additionally, the article was widely circulated and disseminated throughout the office. The court also reasoned that "although the newspaper article distributed and posted by McKenzie shows awareness of consumer fraud, the `in furtherance of' language requires more than merely reporting wrongdoing to supervisors." Id. at 516. The court stated that McKenzie's "numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government." Id. at 517. Therefore, McKenzie did not put BellSouth on notice of the "distinct possibility" that she might pursue a False Claims Act suit or inform the government that

BellSouth's fraudulent conduct was causing an economic loss to the government.

These cases are illustrative of the general rule that a successful cause of action under § 3730 requires an employee to prove that he engaged in "protected conduct," that is conduct in furtherance of a False Claims Act suit, and that his employer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against him because of his "protected conduct." As noted, this is a fact specific inquiry.

2.

Although reporting "fraudulent" and "illegal" activity to an employer may satisfy the "protected conduct" and notice requirements in many § 3730(h) cases, in some instances where an employee's job duties involve investigating and reporting fraud, the employee's burden of proving he engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation is heightened. As the Court of Appeals for the Fourth Circuit held in Eberhardt v.

Integrated Design & Constr., Inc., 167 F.3d 861, 868 (4th Cir. 1999), "If an employee is assigned the task of investigating fraud within the company, courts have held that the employee must make it clear that the employee's actions go beyond the assigned task [in order to allege retaliatory discharge under § 3730(h)]." The court stated that when an employee is assigned the task of investigating fraud, "such persons must make clear their intentions of bringing or assisting in a [False Claims Act] action in order to overcome the presumption that they are merely acting in accordance with their employment obligations." Id. This requirement is consistent with the understanding that the employer must be put on notice that the employee is contemplating a potential False Claims Act suit before liability will attach under § 3730(h).

In Ramseyer, 90 F.3d at 1523, the Court of Appeals for the Tenth Circuit found a plaintiff who was the clinical director of a mental health facility, whose responsibilities included monitoring compliance with applicable Medicaid requirements, did not engage in

"protected conduct" when she reported to her superiors that the facility was not complying with various Medicaid requirements. The court reasoned that these reports to her supervisors, without more, did not put defendants on notice of a potential qui tam suit because the reporting was part of plaintiff 's job duties. The court stated,

> Plaintiff never suggested to defendants that she intended to utilize [their] non compliance in furtherance of a [False Claims Act] action. Plaintiff gave no suggestion that she was going to report such noncompliance to government officials, nor did she provide any indication that she was contemplating her own qui tam action. Rather, the monitoring and reporting activities described in plaintiff 's complaint [i.e., reporting to her superiors] were exactly those activities plaintiff was required to undertake in fulfillment of her job duties, and plaintiff took no steps to put defendants on notice that she was acting "in furtherance of " a [False Claims Act] action.

Id. at 1523 (internal citations omitted).

In Robertson, 32 F.3d at 952, the Court of Appeals for the Fifth Circuit held a senior contract administrator with the Army Helicopter Improvement Program, who was responsible for ensuring that costs were properly charged to the government and requests for additional government funding were properly substantiated, did not engage in "protected conduct" when he reported to his superiors that certain requests for additional government funding were not properly substantiated. In Robertson, plaintiff investigated and tried to verify the requests for funding and over the course of several months reported his findings to his superiors. The court found this activity was not protected because plaintiff " `did nothing to rebut his supervisor's testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job responsibilities in furtherance of a qui tam action.' " Id. (quoting district court opinion). The court reasoned that plaintiff "never characterized his concerns as involving illegal, unlawful, or false-claims investigations . . . . [There is] no evidence that [plaintiff] expressed any

concerns to his superiors other than those typically raised as part of a contract administrator's job." Id.

Even though an employee's job duties include investigating or reporting fraud, the employee may still engage in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation. In Eberhardt, 167 F .3d at 868, the Court of Appeals for the Fourth Circuit stated an employee can put his employer on notice

> by expressly stating an intention to bring a qui tam suit, . . . [or by engaging in] any action which a fact finder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility. Such actions would include, but are not limited to, characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved. These types of actions are sufficient because they let the employer know, regardless of whether the employee's job duties include investigating potential fraud, that litigation is a reasonable possibility

In Eberhardt, 167 F.3d at 868, a senior staff vice-president whose job duties included organizing his employer's accounting system engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation when he began investigating his employer's charges to the United States State Department for work not actually performed. Although plaintiff 's job duties required him to investigate fraud, the court found he engaged in "protected conduct." The court reasoned plaintiff reported to his employer that the charges were "illegal." Id. Additionally, he informed his employer that it was advisable to obtain legal counsel. The court concluded these activities were sufficient to put his employer on notice of potential False Claims Act litigation. Id.; see also Mann, 49 F. Supp.2d at 1316 (employee whose job duties included reporting and investigating compliance with Medicare regulations did not put employer on notice of False Claims Act litigation when she reported billing overcharges to supervisor because this reporting was part of her regular job duties, however

when she reported this information to her employer's legal department she engaged in protected conduct).

D.

We fail to see how Hutchins engaged in "protected conduct." Similarly, we do not believe that Wilentz, Goldman & Spitzer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against Hutchins because of his "protected conduct." Hutchins never threatened to report his discovery of the firm's Westlaw and LEXIS billing practices to a government authority, nor did he file a False Claims Act suit until after he was terminated. Childree, 92 F.3d at 1146. Furthermore, Hutchins never informed his supervisors he believed this billing practice was "illegal," Ramseyer, 90 F.3d at 1523, or that the practice was fraudulently causing government funds to be lost or spent. Robertson, 32 F .3d at 951. Nor did he advise his employer that corporate counsel be involved in the matter. Eberhardt, 167 F.3d at 869. Rather, in a single memorandum he stated, "I was told the firm has a policy

whereby actual Westlaw and LEXIS expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for." As held in Zahodnick , 135 F.3d at 914, "simply reporting [a] concern of mischarging . . . does not establish that [plaintiff] was acting in furtherance of a qui tam action." Hutchins's memorandum merely stated, as a matter of fact, the firm's policy of passing on Westlaw charges to clients. The memorandum did not inform Wilentz, Goldman & Spitzer that he intended to use this information in furtherance of a qui tam action or that he was going to report it to government authorities because he believed the law firm was defrauding the government. Robertson, 32 F.3d at 952; Mikes, 889 F. Supp. at 753 (plaintiff must show employer was on notice that she was "laying the groundwork for legal action").

Nor did Hutchins's complaint to Marie Henneberry about the practice of paralegals performing secretarial tasks put the law firm on notice of the "distinct possibility" of False Claims Act litigation. Hutchins approached Henneberry only to "confirm basically that

[another paralegal] had talked to her about [using paralegals for secretarial tasks]," never advising Henneberry that he thought the practice was illegal or fraudulently causing loss of government funds.[10] Similar to the plaintiff in Zahodnick, Hutchins "merely informed a supervisor of a problem and sought confirmation that a correction was made." 135 F.3d at 914. As held in Luckey, "An employer is entitled to treat a suggestion for improvement as what it purports to be rather than a precursor to litigation." 183 F .3d at 733. Because Hutchins's single discussion with Henneberry did not allege fraud, illegality or a potential False Claims Act suit, we fail to see how the conversation put Wilentz, Goldman & Spitzer on notice of the "distinct possibility" of False Claims Act litigation. McKenzie, 219 F.3d at 516 (plaintiff "must sufficiently allege activity with a nexus to a qui tam action, or fraud against the United States Government").

Hutchins claims that aside from his "reporting" (the memorandum to DeLucia and his conversation with

[10] Hutchins told Henneberry that he thought the practice was "unethical."

Henneberry), he was involved in the initial investigation of a potential False Claims Act suit. See Yesudian, 153 F.3d at 740 (Section 3730(h) "protect[s] employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together."). He contends his discussion with Marie Henneberry about the Westlaw and LEXIS charges and his request for billing documents from the accounting department constituted "investigation" that put Wilentz, Goldman & Spitzer on notice of the "distinct possibility" of False Claims Act litigation. We disagree.

Hutchins's "investigation" was in response to a specific assignment from Louis DeLucia who asked him to determine why certain clients' computerized research costs were so high. Hutchins's inquiry to Henneberry about the practice was not the result of his independent suspicions that the firm was involved in fraud. As held in Eberhardt, 167 F.3d at 868, if an employee is assigned the task of investigating fraud within the company, that employee must make it clear that his investigatory and reporting activities extend beyond the assigned task in

order to allege retaliatory discharge under § 3730(h). We see no evidence that Hutchins engaged in any conduct, beyond what was specifically asked of him in accordance with his job duties, that gave any indication that he was investigating fraud for a potential False Claims Act suit. He did not communicate that he was going to report the activity to government officials nor that he was contemplating his own qui tam suit. Robertson, 32 F.3d at 952. He did not use the terms "illegal" or "fraud" nor did he attempt to discuss the billing practice with corporate counsel. Eberhardt, 167 F.3d at 869; Neal, 33 F.3d at 865. Rather, he merely performed the task he was asked to complete by his supervisor. Ramseyer, 90 F.3d at 1523; Mann, 49 F. Supp.2d at 1316.

Hutchins contends his "investigation" into Westlaw and LEXIS billing was not part of his job duties. He argues that unlike the plaintiffs in Robertson, Ramseyer and Eberhardt, his job description as a paralegal did not contain "monitoring or reporting" activities, nor was he a "fraud investigator." Nonetheless, his inquiry into the

Westlaw and LEXIS billing was in furtherance of his job duties. Because he performed the investigation at the direct request of his supervisor, there was no reason to believe that Hutchins would use the information he obtained to bring a qui tam suit. Eberhardt, 167 F.3d 868 ("[An] employee must make it clear that [his] actions go beyond the assigned task."); Robertson, 32 F.3d at 952 (employee not engaged in "protected conduct" because his "actions were consistent with the performance of his [job] duty").

As § 3730(h) makes clear, without notice of an employee's intent to file or assist in a False Claims Act suit, an employer does not engage in prohibited retaliatory conduct under § 3730(h) when it terminates or demotes that employee. McKenzie, 219 F.3d at 516. Here, Wilentz, Goldman & Spitzer was not on notice that Hutchins was contemplating a qui tam suit. Regardless of his job description, Hutchins's "investigation" into the firm's billing practice resulted from a direction from his employer.

Finally, we do not believe Hutchins's request for billing documents from the accounting department was

protected investigatory conduct that put the law firm on notice of the "distinct possibility" of False Claims Act litigation and therefore evidence that the law firm retaliated against him. As the record makes clear, Wilentz, Goldman & Spitzer decided to fire Hutchins before he requested these documents. Because the law firm was unaware of Hutchins's request for these documents when it decided to fire him, it did not retaliate against him in violation of § 3730(h) because of his "investigation" into the firm's accounting files.

Hutchins has failed to assert a prima facie case of retaliatory discharge under § 3730(h). By failing to prove that he engaged in "protected conduct" and that he put his employer on notice of the "distinct possibility" of False Claims Act litigation, Hutchins, as a matter of law, cannot prove a violation of § 3730(h). We agree with the District Court that Wilentz, Goldman & Spitzer did not terminate Hutchins in retaliation for his "investigation" in furtherance of a False Claims Act suit.

V.

For the foregoing reasons, we will affirm the District Court's dismissal of Hutchins's qui tam claims. We also will affirm its grant of summary judgment for Wilentz, Goldman & Spitzer on the retaliatory discharge claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHARLES T. HUTCHINS,	:	Civil No. 96-5988
Plaintiff,	:	**ORDER**
v.	:	
WILENTZ, GOLDMAN & SPITZER, P.C., LOUIS DeLUCIA, JOAN LAVERY and JOHN DOES "1" through JOHN DOES "3"	:	**FILED** **SEP 8 1998** **WILLIAM T. WALSH** **CLERK**
Defendants.	:	

For the reasons set forth in the Opinion filed herewith,

It is on this 8th day of September 1998

ORDERED that defendants' motion for summary judgment is **granted** as to Count One of the Corrected Amended Complaint; and it is further

ORDERED that plaintiff's state law claims in Counts 2, 3 and 4 are dismissed without prejudice for lack of subject matter jurisdiction.

SO ORDERED

KATHERINE S. HAYDEN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

CHARLES T. HUTCHINS,	:	Civil No. 96-5988
Plaintiff,	:	**OPINION**
v.	:	
WILENTZ, GOLDMAN & SPITZER, P.C., LOUIS DeLUCIA, JOAN LAVERY and JOHN DOES "1" through JOHN DOES "3"	:	**ORIGINAL FILED SEP 8 1998 WILLIAM T. WALSH CLERK**
Defendants.	:	

KATHERINE S. HAYDEN, District Judge

Plaintiff, a former paralegal of the law firm Wilentz, Goldman & Spitzer (WG&S) filed suit against WG&S and several of its employees for retaliatory discharge in violation of § 3730 (h) of the False Claims Act and New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-3. The current version of the Complaint (the Corrected Amended Complaint) also sets forth

common law claims for slander and violation of privacy. This was the first of two actions brought by plaintiff. The second was an FCA qui tam suit he filed against the firm for allegedly submitting false billing statements to the bankruptcy court. The Court consolidated both actions for discovery purposes, and on August 4, 1998 dismissed the qui tam suit for failure to state a claim pursuant to Fed.R.Civ.P. 12 (b)(6).

In this remaining suit, plaintiff alleges that WG&S and its employees retaliated against him for investigating the firm's billing practices, and terminated his employment in violation of both federal and state "whistle blower" statutes, 31 U.S.C. § 3730 (h) and N.J.S.A. 34:19-3. In addition, he claims that defendants defamed his reputation by their disparaging comments and violated his privacy rights by portraying him in a false light. Defendants move for summary judgment under Fed.R.Civ.P. 56 (c) on all the counts in the Corrected Amended Complaint. Both parties have briefed the issues and the Court has made its decision without oral argument. Rule 78. For the reasons that follow the

Court will grant defendants' motion for summary judgment as to plaintiffs federal retaliation claim, and dismiss the remaining state law claims for lack of subject matter jurisdiction.

BACKGROUND

From March 1993 to October 1995 plaintiff worked as one of two paralegals in WG&S's creditors' rights department. His duties included assisting in the preparation of fee applications to be submitted by WG&S to the United States Bankruptcy Court for approval and payment from the debtor's estate.

On August 2, 1995 plaintiffs supervisor, defendant Louis T. DeLucia, asked plaintiff to find out why certain computerized research costs were so high in a particular bankruptcy case. P1.'s Br. Opp. at 21. Later that day Plaintiff submitted a one paragraph memo explaining, "I was told that the firm has a policy whereby actual Westlaw and Lexis expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for." Murphy Cert., Ex. E. Plaintiff claims that in late August or early September of 1995 he tried to discuss the memo

with DeLucia, but that DeLucia brushed him off claiming he was too busy to discuss the matter. Pl.'s Br. Opp. at 9. Plaintiff never pursued the issue and no one at WG&S discussed the memo with him after he submitted it to DeLucia.

Plaintiff describes another incident that occurred in late August 1995, when he talked to Marie Hennebery, the paralegals' supervisor, about how the firm billed for the paralegals' time. After bringing up the matter with Hennebery that one time, plaintiff admits that he never again discussed the issue with any supervisor at WG&S. Murphy Cert., Ex. B (Hutchins Dep. 97:7-9).

Approximately a month later, on September 22, 1995, DeLucia and others at WG&S called plaintiff to a meeting to discuss his continued employment at the firm. In a six-page letter to co-worker Kim Haan, dated September 25, 1995, plaintiff listed the issues discussed at the meeting:

> The announcement in May that there would not be a law clerk position available to me on the creditors' rights team (despite universal agreement that the

quality of the pleadings drafted by me to date is good to very good); and

The withdrawal of support by Louis [DeLucia] in May that I was not to be allowed to leave work early to attend my evening classes this semester (despite the fact that no mission went unaccomplished last year, and no court deadlines were missed due to my leaving early for class); and

The decision that no creditors' rights team paralegal were authorized to work overtime - policy effective on or about June 1, 1995 (immediately right after I finished my Spring law exams). I inadvertently learned while looking through trustee files in Andrew's[1] cubical [sic], that despite the stated policy, since June 1, 1995, Andrew has been approved for and paid for in excess of 80 hours overtime. Louis was stunned speechless Friday evening when he became aware that I knew of this preferential

[1] Andrew Wagner was the other paralegal working with plaintiff in WG&S's creditors' rights department.

treatment. He didn't deny that it was true (Marie Hennebery who reviews the reports knew that what I said was true), but wanted to know how I knew: and

Since June 1, *1995.* less than *5%* of all work assignments from Louis are given to me. Louis gives me work only when he can't find Andrew and he's in a hurry; and

On or about June *15, 1995* Louis extended to me an unqualified invitation to leave the bankruptcy team since I was not pleased with his changes.

Murphy Cert., Ex. C at 1-2. As evidenced from plaintiff's note above, and his subsequent deposition testimony, no WG&S supervisor at the September 22 meeting, or anytime thereafter, ever discussed with plaintiff the contents of his memo on the research billings, or his complaint to Hennebery regarding the firm's use of paralegals. Murphy Cert., Ex. B (Hutchins Dep. 86:12-19; 123:1 to124:8; 128:15-20; 97:7 to 98:4).

In his letter to Haan, plaintiff claimed that the real reason for the September 25th meeting was because of a

rumor that he was responsible for circulating a disparaging letter about Andrew Wagner (the "Andrew letter") around the firm. In his letter to Haan plaintiff notes, "Louis [DeLucia] was reluctant to admit that the 'letter accusation' was the driving force behind any of these actions, but he could offer no explanation for this behavior - especially since he was at least honorable enough not to attack the quality of my work." Id. at 2. Plaintiff claimed that the day of the meeting "could well have been my last day at Wilentz." Id., Ex. C at 1. Plaintiff's letter continues, accusing Haan of spreading the rumor that he wrote the "Andrew letter":

> You considered my prior use of gorilla tactics against the I.R.S., my ex-wife and her attorneys as evidence that I wrote the [Andrew Wagner] letter. . . . The next time you might injure someone less prepared to deal with abuse, or the person you injure just might file a defamation/slander lawsuit against you.

Id. at 5-6.

Haan found the letter on her desk on September 26, 1995 and went to see Anne Riegle, Manager of Personnel at WG&S. According to Riegle's notes (dated that day), Haan was "terrified" of what plaintiff might do to her, and was "visibly upset." Riegle Cert., Ex. A, p.1. Riegle contacted Marie Hennebery and Bruce Wright (Executive Director of Administration), who spoke with Haan about the letter and her concerns regarding plaintiff. According to Riegle's notes of the meeting, Wright told Haan that the firm would consider how to handle the situation with plaintiff, and Haan asked that they consult with her before taking any action "because if anything happens to Chuck, she feels she is in danger." Id. at 2.

Defendants claim that the following day they decided to terminate plaintiff's employment. Riegle, Wright and Hennebery advised Haan of their decision and Haan asked that they wait until after the weekend before taking any action. She explained that she was taking a law school admission test on Saturday and was afraid

plaintiff would do something to disturb her because he knew about the exam and where she was taking it. Hann also asked if she could take the following Monday and Tuesday off and if the firm could provide her some security in the event plaintiff returned to WG&S after his discharge. Riegle and the others agreed with Haan's requests and promised to move her work station temporarily after she returned to work on Wednesday. Id. at 2-3.

Plaintiff claims that when he arrived at work on Monday, October 2nd, he requested certain files from the accounting office at WG&S, which he alleges bore evidence of WG&S's fraudulent billing practices. Pl.'s Br. Opp. at *15.* Less than two hours later he was fired and escorted from the building. Plaintiff claims the timing of his discharge and the nature of his complaints to WG&S in the two months preceding his termination support his claim of retaliatory discharge. Defendants argue that real reason for plaintiff's discharge "came as the culmination of escalating problems with his

superiors and with staff, the last of which was Ms. Haan's receipt" of the September 26 letter. Def.s' Reply Br. at 4.

SUMMARY JUDGMENT STANDARD

A defendant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories. and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" for trial. Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The substantive law governing the action determines which facts are material, and a dispute is genuine only if the nonmovant's proofs can justify a reasonable jury finding in his/her favor. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248 (1986). The nonmovant must "set forth specific facts," beyond the "mere allegations or denials" contained in the pleadings. Fed. R. Civ. P. 56 (e); Matsushita Electric Industrial Co.. v. Zenith Radio Corporation, *475* U.S. *574,* 586-87 (1986). All

inferences are viewed in favor of the nonmovant, and where the parties' allegations are in conflict, the nonmovant's version will be adopted in deciding the motion. National State Bank v. Federal Reserve Bank of New York, 979 F.2d 1579, 1581 (3dCir. 1992).

DISCUSSION

A. Retaliatory Discharge Under § 3730 (h) of the False Claims Act

Section 3730 of the False Claims Act protects employees who assist in investigating and prosecuting their employers for submitting false claims to the government in violation of the False Claims Act. Section (h), added to the Act in 1986, provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under

this section, including investigation for, initiating of testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

Neither party has submitted case law for the Court to consider in deciding the merits of plaintiff's FCA retaliatory discharge claim. Because the Court has found no Third Circuit decision analyzing § 3730 (h) liability, and since none has been provided by the parties, the Court will review other circuit and district court decisions to flesh out the statute's protection and determine its application to plaintiffs case.

In Robertson v. Bell Hellicopter Textron. Inc., 32 F.3d 948 (5th Cir. 1994), the district court granted an employer's motion for judgment as a matter of law after a jury found it liable for retaliation under the Act. In that case, the plaintiff worked as a contract administrator for the defendant company and was responsible for ensuring that the company's requests for government funding were verified. He refused to process certain unexplained

requests, and voiced his concerns to several supervisors on a monthly basis. The plaintiff even tried to verify the fund requests by seeking the assistance of other department managers. However, he never disclosed his intention to file an FCA action to anyone until after he was fired. Id. at 948-50.

In affirming the district court's dismissal, the Fifth Circuit stressed that the plaintiff never threatened the defendant with a FCA suit, nor specifically indicated that he felt the unverified fund requests were "illegal" or "unlawful." The court noted that while the Act protects internal and intracompany whistle blowers, the plaintiff's investigations and comments to his supervisors were all actions consistent with the performance of his employment duties. "Thus, the record contains no evidence that Robertson expressed any concerns to his supervisors other than those typically raised as part of a contract administrator's job." The Court found that Robertson's complaints did not constitute protected activity, nor was the defendant

aware that his investigations might have objectively demonstrated his qui tam intentions. Id. at 951-52.

Mikes v. Strauss, 889 F.Supp. 746 (S.D.N.Y. 1995) reviewed the Robertson decision and clarified the protections afforded by section 3730 (h) of the Act. In Mikes the plaintiff worked for a medical provider and learned her employers had been fraudulently billing the government for certain Medicare services. She complained to them on several occasions, and when she told them that she had inspected their private files to investigate the fraud, they became enraged. Within months of her latest complaint, the defendants' terminated her employment. Id. at 749-*50.*

The district court held that to overcome the employer's motion for summary judgment, the plaintiff "must supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a qui tam action against it." Id. at 753. The court denied the

defendants' motion for summary judgment, finding that the plaintiff's conduct was protected under the Act, and that she had produced sufficient evidence for a jury to conclude that defendant had reason to believe she was investigating their alleged fraudulent billing practices in contemplation of a possible qui tam action. The court noted that in its case, unlike Robertson, the plaintiff's job responsibilities did not include investigating the employer's billing practices. Id. at 752-54.

The Tenth Circuit decided a case similar to Mikes in United States ex rel. Ramseyer v. Century Healthcare Corporation, 90 F.3d 1514 (10th Cir. 1996). There, the plaintiff worked for a health care provider and regularly advised her supervisors of the company's noncompliance with Medicaid requirements. She, unlike the plaintiff in Mikes, was responsible for monitoring her employer's Medicaid billings. The court affirmed the district court's dismissal of the FCA retaliation claim, finding that the employee's reporting did not "rise to an allegation that plaintiff performed either an

Investigation for,' or 'provided assistance in,' this or any other FCA action." Id. at 1523. The plaintiff gave no suggestion that she intended to report the defendant's improper billing to the government, nor did she give any indication that she was contemplating her own qui tam action. "Rather, the monitoring and reporting activities described in plaintiff's complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties...." Id.

In Childree v. UAP/GA Ag Chem., Inc., 92 F.3d 1140 (11th Cir. 1996), the plaintiff refused to process her employer's fraudulent billing requests. She brought the issue to the attention of two credit managers and two supervisors, and caused one supervisor to process the bills himself when she refused. One month later a government official visited the defendant company and the plaintiff was swept into an administrative investigation. The plaintiff assisted in the investigation and provided extensive information about her employer's fraudulent billings. After the plaintiff

testified, the defendant employer terminated her employment.

The Childree court found that while the plaintiff admitted that she was reluctant to participate in the administrative investigation and never contemplated bringing an FCA suit on her own, there was a "distinct possibility" that the government would file a FCA action at the time she rendered her assistance. The Eleventh Circuit reversed the district court's grant of summary judgment for the defendant, and reinstated Childree's claim for FCA retaliation. Id. at 1146.

In United States ex rel.Yesudian v. Howard University, 946 F.Supp. 31 (D.D.C. 1996), the plaintiff claimed that individuals in the purchasing department where he worked were "falsifying time and attendance records, providing 'inside information' to selected vendors to aid them in the bidding process, accepting bribes from vendors, taking University property home, issuing orders to vendors without competition, and violating purchasing ethics." Id. at 32 n.1. The plaintiff

complained to upper level officers and supervisors about these alleged improprieties for eight years before being fired.

The court granted the defendant's post verdict motion for judgment as a matter of law, finding no evidence "that plaintiffs complaints were those of an employee concerned that his employer was defrauding the government, rather than those of a disgruntled employee." Id. at 33. The plaintiff never suggested to the defendant that he was going to report his findings to the government, and took no steps which would have otherwise put the defendant on notice that he was acting in furtherance of a FCA action. The court noted that the retaliation alleged must be in response to the plaintiff's acting in furtherance of a False Claims law suit. Retaliation by the employer for any other reason is not punishable under the Act. Id. at 34.

In United States ex rel. McKenzie v. Bellsouth Telecommunications. Inc., 123 F.3d 935 (6th Cir. 1997), the plaintiffs job included receiving and processing

customer complaints about the employer's telephone service, dispatching repair personnel, and closing trouble reports once repairs were done. According to the company's policy, the customer was entitled to a refund unless the company serviced the complaint within a certain period of time, or the company discovered the need for the repair on its own. For a period of approximately eight years, the plaintiff complained to her supervisors that company personnel were falsifying trouble reports and cheating its customers, including the government, out of deserved refunds. On one occasion the plaintiff showed her supervisor a newspaper article describing a qui tam action brought by an employee of a telephone service company in Florida under investigation for similar allegations of fraud. Id. at 937.

The circuit court reversed the district court's dismissal of the plaintiff's FCA retaliation claim. The court distinguished the facts of its case from those in Robertson and Ramseyer, claiming that, unlike those plaintiffs, McKenzie's job responsibilities did not

include reporting billing fraud to her supervisors. The court also found that the defendant company should have been on notice that an FCA action was a distinct possibility after the plaintiff showed her supervisor the newspaper article on the qui tam investigation in Florida. Id. at 944-45.

In Zahodnick v. International Machines Corp., 135 F.3d 911 (4th Cir. 1997), the plaintiff discovered that his employer was improperly billing the government's account for services it performed on other customer projects. Assembling cost information for the company's government contract was part of the plaintiff's job responsibilities. His suit claimed that the company fired him when he reported the improper billings to his supervisor. Id. at 913.

The circuit court affirmed the grant of summary judgment for the employer, finding that the plaintiff's informing his supervisor of the misconduct and seeking confirmation that a correction was being made, "does not suffice to establish that plaintiff was acting in

furtherance of a qui tam action." Id. at 914 (internal quotations omitted). Therefore, the plaintiff's conduct was not protected under the Act.

In Robinson v. Jewish Center Towers. Inc., 993 F.Supp. 1475 (M.D.Fla. 1998), the plaintiff was a bookkeeper responsible for compiling the defendant company's monthly government compliance reports. When she found that certain employees, family members of the company administrator, were submitting false time cards, she complained to her supervisor and asked a HUD approved auditor to review the matter. When the auditor presented her findings to the company's president, the president ordered the administrator to freeze all payroll adjustment checks. After witnessing the administrator's reaction to the payroll freeze, the auditor told the plaintiff, "[I]t looks like you lost your job." Id. at 1476. The auditor informed the plaintiff that she had spoken to a HUD attorney, that the insurance company was considering filing criminal charges, that she was sending a letter to

the New Jersey Inspector General, and that plaintiff should consider appearing before HUD to give her testimony under oath. The auditor also advised the company's president that the plaintiff felt her job was in jeopardy and intended to speak to an attorney. In February 1997 the plaintiff gave the administrator a list of the company's documented payroll violations and she was fired that same day. Id. at 1477.

The employer moved to dismiss the complaint for failure to state a claim, which the district court denied. The court found that plaintiffs contacting the HUD auditor could be viewed as initiating a government inquiry into her employer's fraud and rejected the defendant's argument that it was not on notice of a possible FCA action. Id. at 1478.

II.

Returning to the case *sub judice,* for plaintiff to succeed in his FCA retaliation claim against defendant WG&S, he must first prove that his conduct was

"protected" under the False Claim Act. This means that he was acting with the intent to uncover WG&S's alleged fraud upon the government. If plaintiff can show this motivation, he then must prove that defendant knew he was engaged in the protected conduct and that there was a "distinct possibility" of an FCA action against it. Finally, plaintiff must offer evidence that WG&S fired him because of his protected activity. See Zahodnick, 135 F.3d at 913-914; McKenzie, 123 F.3d at 944; Robertson, 32 F.3d at 951; Mikes, 889 F.Supp. At 752.

Plaintiff's Conduct Was Not Protected under the Act

After careful consideration of the cases reviewed above, and viewing the facts in the light most favorable to plaintiff, the Court finds that plaintiff's FCA retaliatory discharge claim should be dismissed. The "protected conduct" that plaintiff claims prompted defendant's retaliation and his eventual termination included: (1) doing research for, and submitting, the August 2, 1995 memo to his supervisor indicating the

firm's billing policy for its computerized research costs; and (2) questioning Marie Hennebery (the paralegal supervisor) about the firm's use of its paralegals' billable time.

The Court finds that neither activity can be viewed as protected conduct under the False Claims Act. In support, the Court notes that plaintiff only looked into the firm's research costs because his supervisor, defendant DeLucia, asked him to. Pl.'s Br. Opp. at 21. The memo and all research involved, was, therefore, the product of a specific assignment given to him by his supervisor. It was not the result of plaintiff's independent investigation prompted by a suspicion of fraud upon the government. In this way plaintiff's conduct was very similar to the plaintiffs in Robertson and Ramseyer, supra, whose actions were not considered protected conduct under the Act by the reviewing circuit courts.

Plaintiff next claims that his complaint to Marie Hennebery about the firm's use of paralegals for

secretarial tasks was protected conduct under the Act. At his deposition plaintiff explained,

> It was a protest against unethical billing practices regarding performing in [sic] billing for secretarial tasks being instructed to creatively write our time entry, so we could get billed for it, and for the indiscriminate and purposely [sic] running pacer service to generate revenue for the department.

Murphy Cert., Ex B, 125:3-13. But when asked to describe exactly what plaintiff said to Hennebery in his "protest" plaintiff testified, "I asked her to confirm basically if Andrew had talked to her about what we were being asked to do as paralegals, and she said, yes, and she indicated that she was following up on it. She was aware of the problem, and she said she would let us know what was going on." Id. at 96:8-15. Plaintiff admitted that it was Andrew Wagner who first approached Hennebery, "but had he not, it was [plaintiff's] intention to raise the issue for the first time." Id.at 126:18-21.

Plaintiffs contact with Hennebery is much like the plaintiff's conduct in Zahodnick, 135 F.3d 911, which the Fourth Circuit refused to view as protected under the FCA. There, the circuit court found that the plaintiff had "merely informed a supervisor of a problem and sought confirmation that a correction was made," never advising anyone at the company that he was pursuing a qui tam action against them. In much the same way it would be stretching the protections afforded by § 3730 (h) to view plaintiff's conduct, even in the best light, as anything more than an attempt to confirm that Wagner's complaint was received and would be dealt with.

Defendants' Knowledge of Plaintiff's Protected Conduct

Even if the Court had found plaintiff's conduct to be protected under the Act, he has failed to show that defendants were on notice that a FCA action was a "distinct possibility." Neal v. Honeywell, 33 F.3d 860, 864 (7th Cir. 1994); Childree, 92 F.3d 1140, 1145. "The legislative history [of § 3730 (h)] makes clear that a

whistle blower must show the employer had knowledge the employee engaged in protected activity." Robertson, 32 F.3d at 951 (quoting S.Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), reprinted in 1986 U.S.C.A.N. 5266, 5300).

A plaintiff can satisfy this notice requirement in either of two ways: (1) by having advised the employer that he was currently a part of, or anticipated providing assistance in, an FCA action, or (2) by acting in such a way as to imply such involvement or intent. Because plaintiff never expressed his qui tam intentions to anyone at WG&S prior to his termination, the Court must determine whether his conduct could have placed defendants on notice of a possible FCA action.

The record is clear that at no point did plaintiff complain or express any objection to the firm's alleged policy of inflating research costs. He merely performed the limited billing research his supervisor asked of him, wrote his findings down in an interoffice memo, and submitted it to DeLucia. Though he claims DeLucia brushed him off the one time he did try to discuss the

memo's contents, he admits that no supervisor at the firm ever spoke with him about the writing. Nevertheless, without any supporting evidence, plaintiff concludes that "DeLucia knew that [my] having told him about that practice had consequences." Pl.'s Br. Opp. at 21. This is insufficient to support the necessary showing plaintiff must make that WG&S had knowledge of his qui tam intentions.

His communication with Hennebery regarding the firm's use of paralegals was even less likely to alert anyone of the possibility of suit. Plaintiff admits that he merely "asked her to confirm if Andrew had talked to her about what we were being asked to do as paralegals. . . ." Murphy Cert., Ex. B (Hutchins Dep. 96:10-12). In reply, Hennebery said that she "was aware of the problem and would let [plaintiff and Wagner] know what was going on." Nothing in plaintiff's own version of the "complaint" to Hennebery could have placed anyone at WG&S overhearing it on notice that he was "laying the groundwork for legal action." Mikes, 889 F.Supp. at 753.

Plaintiff makes other claims about WG&S's billing practices. But he fails to establish facts that demonstrate he alerted his employer, or acted so as to put it on notice, that he was investigating alleged wrongdoings and might be reporting them. Plaintiff's assertions that he knew about unlawful practices, standing alone, without facts to support a finding that defendant fired him in retaliation for investigating and possibly reporting what he discovered, do not constitute enough evidence to support his federal claim in this action.

CONCLUSION

Plaintiff failed to exhibit the type of conduct that would evidence the critical objection, or purposeful investigation, that the FCA's retaliation provision protects. Nothing in the record before the Court could indicate to any reasonable jury that plaintiff's actions were directed towards uncovering and reporting WG&S's alleged fraud upon the government, or that his conduct put defendants on notice of the "distinct possibility" of an FCA law suit. Accordingly, plaintiff is

unable to satisfy the first two elements of his § *3730* (h) claim and it will be dismissed.

Plaintiffs remaining claims are state law causes of action within this Court's supplemental jurisdiction. Pursuant to 28 U.S.C. § 1367 (c) (3) "[t]he district court may decline to exercise supplemental jurisdiction over a claim" if it "has dismissed all claims over which it has original jurisdiction." Where, as here, the federal claim has been dismissed by summary judgment, "the district court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." Maidenbaum v. Balley's Park Place. Inc., 870 F. Supp. 1254, 1267 (D.N.J. 1994) (quoting Tully v. Moft Supermarkets. Inc., 540 F.2d 187, 196 (3d Cir. 1976), aff'd without opinion, 67 F.3d 291 (3d Cir. 1995).

The Court declines to exercise supplemental jurisdiction over plaintiff's state law claims for slander, violation of privacy, and retaliatory discharge under

N.J.S.A. 34:19-3, and they will be dismissed without prejudice for lack of subject matter jurisdiction.

KATHERINE S. HAYDEN, U.S.D.J.

Dated: 9/8/98

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES of AMERICA, ex rel. CHARLES T. HUTCHINS, Qui Tam	:	Civil No. 96-5988
Plaintiff-Relator,	:	**ORDER**
v.	:	
WILENTZ, GOLDMAN & SPITZER, P.C.,	:	**ORIGINAL FILED AUG 4 1998**
	:	**WILLIAM T. WALSH**
Defendant.	:	**CLERK**

For the reasons set forth in the Opinion filed herewith,

It is on this 4th day of August 1998,

ORDERED that defendant's motion to dismiss the Complaint is **granted**, and it is further

ORDERED that the Complaint is dismissed, and it is further

ORDERED that plaintiff's request for leave to amend his Complaint is **denied.**

KATHERINE S. HAYDEN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

UNITED STATES of AMERICA, ex rel. CHARLES T. HUTCHINS, Qui Tam	:	Civil No. 96-5988
Plaintiff-Relator,	:	**OPINION**
v.	:	
WILENTZ, GOLDMAN & SPITZER, P.C.,	:	**ORIGINAL FILED AUG 4 1998 WILLIAM T. WALSH CLERK**
Defendant.	:	

KATHERINE S. HAYDEN, District Judge

This is the second of two consolidated actions brought by plaintiff against his former employer, the defendant law firm. In this suit, plaintiff, acting as qui tam on behalf of the United States, claims that defendant violated the False Claims Act, 31 U.S.C. § 3729, et seq., when it submitted false fee applications to the bankruptcy courts while representing former clients. Defendant has moved for dismissal under both

Fed.R.Civ.P. 12 (b) (6) and the doctrine of res judicata. The parties have fully briefed the issues and the Court has made its decision without oral argument. Rule 78. Defendant's motion will be granted.

BACKGROUND

Wilentz, Goldman & Spitzer ("WG&S") is a New Jersey law firm with a bankruptcy department that deals in creditors' rights. Plaintiff, a former paralegal assigned to WG&S's creditors' rights department, claims - defendant submitted false billing statements to the bankruptcy courts for review, which were approved without objection by the parties, and paid out of the debtors' estates. Plaintiff filed this suit after WG&S terminated his employment in October 1995.[1]

[1] Plaintiffs other lawsuit against WG&S states claims under, inter alia, the state and federal "Whistle Blower statutes" (31 U.S.C. § 3730 (h) and N.J.S.A. § 34:19-3). Defendant's motion for summary judgment on these claims is currently pending.

DISCUSSION

Defendant argues that the Complaint fails to allege conduct prohibited under the False Claims Act ("FCA"). A court may dismiss an action for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The Complaint alleges that defendant violated parts (1),(2) and (7) of subsection (a) of the False Claims Act. A party is liable under these provisions when it

> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;
>
> (2) makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;[or]
>
> * * *
>
> (7) makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an

obligation to pay or transmit money or property to the Government.

Defendant argues that even had it submitted false billing statements to the bankruptcy courts, the monies it received came from the debtors' estates and not the Government. In his opposition, plaintiff asserts that any wrongful depletion of a debtor's estate could result in the Government receiving less money than it was entitled to "because the United States is frequently if not generally a creditor in bankruptcy cases." Pl.'s Br. Opp., at 13.

A. False Claims Act.

Congress passed the FCA in 1863 after it discovered widespread fraud against the Government by parties charging inflated prices for faulty munitions during the Civil War. Rainwater v. United States, 356 U.S. 590, 592 (1958). Since its enactment the Act has permitted private individuals, known as qui tam plaintiffs, to initiate suit on the Government's behalf. 31 U.S.C. § 3730(b).

The Act's objective is "[to] protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made." Rainwater, 356 U.S. at 592. According to the Supreme Court, "This remedial statute reaches beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." United States v. Neifert-White Co., 390 U.S. 228. 233 (1968). Courts do not construe the Act narrowly. Its reach even extends to those whose false statements cause a third party to present a false claim to the Government. an "intermediary theory" of liability which was first expressed by the Supreme Court in United States v. ex rel. Marcus v. Hess, 317 U.S. 537 (1942), reh'g denied, 318 U.S. 799 (1943). In Hess the Supreme Court held a subcontractor liable who submitted a false bid to a third party for a federally subsidized public works contract finding the elements of FCA liability were satisfied because the third party used funds provided by the Federal Treasury to pay the defendant's bid. The Hess court explained:

> The government's money would never have been [paid] had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the *local sponsors in* order that they might in turn pay respondents under contracts found to have been executed as the result of fraudulent bidding. This fraud did not spend itself with the execution of the contract.... The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal -- payment of government money to persons who caused it to be defrauded.

Id. at 543-55.

Originally, for a defendant to be liable under the Act, he had to overstate an amount he was due. Case law would later interpret, and congressional amendments expressly reflect, the Act to encompass a defendant's "reverse fraud claim," which occurs when the accused understates a debt he owes the Government. See 31 U.S.C. § 3729 (a) (7).

In his Complaint, plaintiff uses the intermediary theory in the context of a reverse false claim. He alleges that by overstating an amount it was due from a third party (the intermediary), WG&S caused the Government to receive less money than it was entitled (reverse false claim). But this strains the FCA's reach beyond its limits. In each of the reported cases plaintiff offers to support his theory, the intermediary has control over government funds for the purpose of properly reimbursing a non-fraudulent party, and the suit is filed because the funds wind up in the hands of an improper claimant. See e.g. Hess, 317 U.S. 537 (bill submitted through intermediary local government for federally funds); Rainwater v. United States, 356 U.S. 590, 592 (false loan application to agency established by Congress for the purpose of carrying out federal farm programs with public funds); United States v. Board of Educ. of Union City, 697 F. Supp. 167 (D.N.J. 1988) (claims made to city board of education for government reimbursement).

Were the Court to agree with plaintiff's argument, the Act would apply whenever an individual submits a government-approved false claim to a third party who *happens* to owe an unrelated debt to a government agency. Plaintiff's theory of liability proposes an interpretation of the Act not supported by statute or case law, and one this Court is unwilling to make.

B. The Independent Action doctrine

In its reply brief to plaintiff's opposition, WG&S raised the doctrine of res judicata, and the Court allowed plaintiff to submit a sur-reply to address that issue. In the sur-reply plaintiff refers to the independent action doctrine set forth in Federal Rule of Civil Procedure 60 (b). Like subsection (3) of that Rule, an independent action claim permits the court to review a prior order or judgment allegedly induced by the fraud of an adverse party. Unlike Rule 60 (b) (3), however, there is no time limit, besides the equitable doctrine of laches, on a party raising an "independent action" claim. Fed. R. Civ. P. 60(b).

To merit relief under the doctrine, the claimant must present evidence of gross injustice. "Independent actions must, if Rule 60 (b) is to be interpreted as a coherent whole, be reserved for those cases of injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." United States v. Beggerly, __U.S.__, 118 S.Ct. 1862, 1866 (1998) (internal citations and quotations omitted).

Plaintiff requests leave to amend his Complaint to include an "independent action" claim, but fails to address how he has standing to commence such an action on behalf of the United States. Unlike the False Claims Act, which authorizes a private citizen to prosecute a claim on the government's behalf, there is no such right where the independent action doctrine is concerned. A similar case arose in United States ex rel. Houck v. Folding Carton Administration Committee, No. 87-C-1253, 1998 WL 74829 (ND. Iii. Jan. 20, 1988), where the plaintiff brought suit under the False Claims Act and the independent action doctrine,

claiming that monies meant for the government were being wrongfully distributed pursuant to a court-approved settlement agreement that was allegedly procured by fraud. The district court dismissed the plaintiff's FCA claim for want of jurisdiction and found that plaintiff lacked standing to raise the independent action claim. "Allegations of fraud upon the court call for the use of the court's most extraordinary equitable powers. To exercise those powers without requiring the plaintiff to show some personalized injury would permit any person who perceives an injustice in the settlement of any lawsuit to bring an action." Id. at *5•

Here, plaintiff is unable to show any personalized injury stemming from defendant's alleged fraud upon the bankruptcy courts. Accordingly, plaintiffs request for leave to amend his Complaint to add a Rule 60 (b) claim will be denied.

CONCLUSION

There is no provable set of facts which would support plaintiffs claim for relief under the False Claims Act, and the Court will grant defendant's motion to dismiss. In addition, plaintiff's request for leave to amend his Complaint is denied. An appropriate Order will follow.

KATHERINE S. HAYDEN, U.S.D.J.

Dated: August 4, 1998

Filed June 13, 2001
Amended August 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6248 & 98-6339

CHARLES T. HUTCHINS

v.

WILENTZ, GOLDMAN & SPITZER;
LOUIS DeLUCIA;
JOHN DOES "1" THROUGH JOHN DOES "3";
JOAN LAVERY

(Newark D.C. Civil No. 96-4678)

CHARLES T. HUTCHINS

v.

ABC CORP., SEALED

(Newark D.C. Civil No. 96-5988)

Charles T. Hutchins,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 96-cv-04678 & 96-cv-05988
(Honorable Katharine S. Hayden)

Argued February 8, 2001

Before: SCIRICA, McKEE and STAPLETON, Circuit Judges

(Filed: June 13, 2001, Amended August 16, 2001)

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OPINION OF THE COURT

SCIRICA, Circuit Judge

The principal issue on appeal is whether the submission of fraudulent legal bills for approval to the United States Bankruptcy Court violates the False Claims Act, 31 U.S.C. § 3729. We hold the False Claims Act only prohibits fraudulent claims that cause ***or would cause*** economic loss to the government. We also hold that a retaliatory discharge cause of action under 31 U.S.C. § 3730(h) requires proof that the employee engaged in "protected conduct" and that the employer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against the employee

I.

Charles Hutchins was one of two paralegals in the creditors' rights department of the New Jersey law firm of Wilentz, Goldman & Spitzer from March 1993 to

October 1995. On August 2, 1995, Louis T. DeLucia, a partner in Wilentz, Goldman & Spitzer's creditors' rights department, asked Hutchins to investigate certain client bills, with particular attention to the "high costs" of certain computerized research. After investigating the matter and discussing it with the law firm's paralegal supervisor, Marie Henneberry, Hutchins submitted a short memorandum to DeLucia stating, "I was told that the fir m has a policy whereby actual Westlaw and LEXIS expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for." Hutchins also expressed concern to Henneberry that paralegals were being used to perform secretarial tasks resulting in overcharging clients.

On September 22, 1995, over a month after submitting his billing practices memorandum, Hutchins was summoned by firm management to a meeting to discuss his continued employment. Hutchins contends the law firm wanted to fire him because of his "investigation" into their fraudulent billing practices. Wilentz, Goldman & Spitzer countered they were upset

over Hutchins's relationships with other firm employees, and wanted to discuss an anonymous memorandum circulated in May 1995 containing disparaging comments about Andrew Wagner, the other paralegal in the creditors' rights department. The law firm advised Hutchins that they believed he wrote the memorandum. After denying involvement, Hutchins wrote a letter to Kim Haan, a paralegal in another department whom he believed was the source of the accusation, stating,

You considered my prior uses of guerilla tactics against the I.R.S., my ex-wife and her attorneys as evidence that I wrote the . . . [disparaging memorandum]. The I.R.S. has stolen my money, locked me up in court battles for a decade, ruined a relationship/marriage engagement, harassed me and filed hundreds of thousands of dollars in tax liens against me. My ex-wife and her attorneys used perjured testimony and affidavits to induce the government courts to issue restraining orders keeping me away from my children. There just is no comparison between these interferences with my money and my kids, and someone

propositioning a married woman in the office . . . . After you've read Atlas Shrugged two or three more times (I've read it five times) you may recognize Rand's belief that free men have a moral duty to resist abuses of government and to resist the efforts of those who misuse government agencies and government power for personal reasons. Her philosophy guides my subtle warfare against tyrants. Its [sic] a great deal more appropriate than blowing up federal buildings . . . .

I suppose I would hope that if you learn anything from all of this it would be not to be so quick to rush to judgment about people . . . and that you would be careful about what you say about people. The next time you might injure someone less prepared to deal with abuse, or the person you injure just might file a defamation/slander lawsuit against you.

Haan reported to the firm personnel manager, Anne Riegle, that she was "terrified" by the letter. Riegle noted that Haan was "visibly upset" believing that Hutchins might "do something to her." On Friday, September 27, 1997, the law firm decided to terminate

Hutchins as a result of "the culmination of escalating problems with his superiors and with staff."

When informed of the decision to terminate Hutchins, Haan asked the law firm to wait until after the weekend to inform him. Because she was taking the law school admission test that weekend, Haan explained that she was afraid Hutchins would attempt to disrupt her. She also asked to be excused from work the following Monday and Tuesday so that she would not be present when Hutchins was discharged. Wilentz, Goldman & Spitzer agreed.

On Monday, October 2, 1995, Hutchins requested files from the accounting department reflecting the law firm's billing of Westlaw and LEXIS expenses. The accounting department denied him access. Two hours later, Hutchins was informed that he was fired.

On October 18, 1995, Hutchins notified the United States Trustee by sworn affidavit that he believed Wilentz, Goldman & Spitzer had engaged in fraudulent and unlawful billing practices. He filed a pro se qui tam complaint under § 3729 of the False Claims Act alleging

Wilentz, Goldman & Spitzer submitted fraudulent billing statements to the United States Bankruptcy Court and that the law firm violated the whistleblower provisions of the False Claims Act, 31 U.S.C. § 3730(h), by terminating his employment because of his investigation into the firm's billing practices.

The District Court dismissed Hutchins's qui tam claim under Fed. R. Civ. P. 12 (b)(6),[11] and granted Wilentz, Goldman & Spitzer summary judgment on Hutchins's retaliatory discharge claim.[12]

II.

The District Court had jurisdiction over Hutchins's qui tam and retaliatory discharge claims under 28 U.S.C. § 1331. We have jurisdiction over the District Court's final order dismissing his claims under 28 U.S.C.S 1291.

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[11] United States ex rel. Hutchins v. Wilentz, Goldman & Spitzer, C.A. No. 96-5988, slip. op. at *4 (D.N.J. August 4, 1998) ("Hutchins I") (dismissing qui tam claim).

[12] United States ex rel. Hutchins v. Wilentz, Goldman & Spitzer, C.A. No. 96-5988, slip. op. at *15-16 (D.N.J. September 8, 1998) ("Hutchins II") (granting defendant summary judgment on retaliatory discharge claim).

We exercise plenary review over the District Court's grant of summary judgment on Hutchins's retaliatory discharge claim and its dismissal of his qui tam claim under Fed. R. Civ. P. 12 (b)(6). Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 822 (3d Cir. 1999); Malia v. Gen. Elec. Co., 23 F.3d 828, 830 (3d Cir.), cert. denied, 513 U.S. 956 (1994).

III.

A.

The False Claims Act provides:

(a) Liability for certain acts - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United

States Government or a member of the Armed Forces of the United States a false or

fraudulent claim for payment or approval;

(2) knowingly makes, uses or causes to be made or used, a false record or statement to get a

false claim or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * *

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the act of that person . . . .

31 U.S.C. § 3729. An action under the False Claims Act may be commenced in two ways. The United States Department of Justice may file suit to collect damages suffered as the result of fraudulent claims which cause government money to be expended from the United States Treasury. Alternatively, a private plaintiff may

bring a qui tam action[13] on behalf of the government to recover losses incurred because of fraudulent claims. 31 U.S.C. § 3730(b)(1). When a private plaintiff brings a qui tam action, the government is permitted to intervene.

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[13] In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000) (internal citations omitted), the United States Supreme Court set forth the historical foundations of the qui tam suit stating, "qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means `who pursues this action on Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone." The Court further explained,

> Qui tam actions appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf. Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interest.

Id. at 774 (internal citations omitted).

The Court noted that in the 14th century,

> Parliament began enacting statutes that explicitly provided for qui tam suits. These were of two types: those that allowed injured parties to sue in vindication of their own interests (as well as the Crown's) . . . and . . . those that allowed informers to obtain a portion of the penalty as a bounty for their information (about those who transgressed against the king) even if they had not suffered the injury themselves.

Id. at 775 (internal citations omitted).

But the private plaintiff may continue his suit even if the government declines to intervene. 31 U.S.C. §3730(c)(1). If the qui tam suit is ultimately successful, the private plaintiff, known as a relator, is entitled to up to 30% of the funds the government recovers. 31 U.S.C. § 3730(d).

B.

Relying on the qui tam provisions of the False Claims Act, Hutchins filed suit alleging that Wilentz, Goldman & Spitzer's submission of inflated legal bills to the United States Bankruptcy Court violated §3729(a)(1) of the False Claims Act.[14]4 To establish a prima facie case under the False Claims Act a plaintiff must prove: (1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2)

---

[14] As noted, § 3729(a)(1) provides:

Any person who-

(1) knowingly presents, or caused to be presented, to an officer or employee of the United States Government, or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable . . . .

the claim was false or fraudulent; ***and*** (3) the defendant knew the claim was false or fraudulent~~.; and (4) the United States suffered damages as a result of the false or fraudulent claim.~~ Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (quoting Miller v. United States, 550 F .2d 17, 23 (Ct. Cl. 1977)). It is undisputed that the United States Trustee and the United States Bankruptcy Courts are government agents for purposes of the False Claims Act. Additionally, it is clear that inflating the Westlaw and LEXIS expenses was unlawful under the Bankruptcy Code.

The crux of the dispute is whether the submission of these fraudulent bills was a "false claim for payment or approval.," ~~that caused damage to the United States government.~~ Focusing on the latter portion of §3729(a)(1), Hutchins contends that even if no ***claim*** ~~government money~~ were ***made against*** ~~expended from the~~ United States Treasury ***money*** in connection with the law firm's inflated legal bills, the submission of these bills for approval by the Bankruptcy Court violates the False Claims Act.

Although not linguistically implausible, we find no support for this reading from the jurisprudence interpreting the False Claims Act. Rainwater v. United States, 356 U.S. 590, 592 (1958) ("It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims."); United States ex rel. Marcus v. Hess, 317 U.S. 537, reh'g denied, 318 U.S. 799 (1943). Nor have we been able to find any case establishing that a false statement to the government which ***would*** ~~**does**~~ not cause the government economic loss gives rise to False Claims Act liability. United States ex r el. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996) ("[T]he Act attaches liability, not to underlying fraudulent activity, but to the `claim for payment.' ") (quoting United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995)), cert. denied, 519 U.S. 1115 (1997).

"Not all false statements made to the federal government are claims within the meaning of the False Claims Act." United States v. Greenberg, 237 F .Supp. 439, 442 (S.D.N.Y. 1965) (citing United States v.

Howell, 318 F .2d 162 (9th Cir. 1963)). "Even under a somewhat broader definition, only `actions which have the purpose and effect of causing the government to pay out money are clearly `claims' within the purpose of the Act.' " United States v. Lawson, 522 F. Supp. 746, 750 (D.N.J. 1981) (quoting United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), aff'd, 515 F.2d 505 (2d Cir. 1975)); see also United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (False Claims Act reaches to "all fraudulent attempts to cause the Government to pay out sums of money."). ***"While 'recovery under the [False Claims Act] is not dependent upon the government's sustaining monetary damages,' Varljen v. Cleveland Gear Co., Inc., 250 F.3d 426, 429 (6th Cir. 20001), the Act is only intended to cover instances of fraud 'that might result in financial loss to the Government.' Neifert-White, 390 U.S. at 232."*** As the Supreme Court recognized in United States v. McNinch, 356 U.S. 595, 599 (1958) (quoting United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956)), " `The conception of a claim against the

government normally connotes a demand for money or for some transfer of public property.' " In McNinch, the Supreme Court traced the legislative history of the False Claims Act stating,

The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government.

Id. at 599; see also United States ex r el. Pogue v. Am. Healthcorp., Inc., 914 F.Supp. 1507, 1512 (M.D.Tenn. 1996) ("The legislative history of the False Claims Act

reveals that it was designed to protect the Federal Treasury.") (citing S. Rep. No. 99-345 at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5269).

In this regard, we believe Hutchins's reading of the statute expands the False Claims Act's scope of liability to include actions not contemplated by Congress. His argument neglects the statutory definition of the term "claim" which provides,

> For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. S 3729(c).

The False Claims Act seeks to redress fraudulent activity which ***attempts to or actually*** causes economic

loss to the United States government. As the Supreme Court held in Hess, the purpose of the False Claims Act "was to provide for restitution to the government of money taken from it by fraud." 317 U.S. at 551. It was not intended to impose liability for every false statement made to the government.[15] Costner v. URS Consultants, Inc., 153 F .3d 667, 677 (8th Cir. 1998) ("[O]nly those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay, or those actions which intentionally deprive the United States of money it is lawfully due, are properly considered `claims' within the meaning of the FCA.").

For these reasons, we hold the submission of false claims to the United States government for approval which do not ***or would not*** cause financial loss to the

[15] Extending the False Claims Act to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine and essentially permit any plaintiff to sue on behalf of the government when false or misleading statements are made to any government agent including the courts, the legislature or any law enforcement officer.

government are not within the purview of the False Claims Act. Tieger, 234 F.2d at 592 ("The provision relating to the payment or approval of a `claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government."). Unless these claims ***would*** result in economic loss to the United States government, liability under the False Claims Act does not attach. United States v. Bornstein, 423 U.S. 303, 309 n.4 (1976) (" `The conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' ") (quoting McNinch, 356 U.S. at 599).

C.

In dismissing plaintiff 's claims, the District Court stated the Bankruptcy Court was merely acting as an intermediary in approving defendant's false claims. The court noted, "[In most False Claims Act actions] the intermediary [to whom the defendants submitted false claims] has control over government funds for the

purpose of properly reimbursing a non-fraudulent party, and the suit is filed because the funds wind up in the hands of an improper claimant." Hutchins I, slip. op. at *4. The District Court noted that the Bankruptcy Court, as intermediary, did not have similar control over the funds. Permitting this claim, said the District Court, would mean the False Claims Act would "apply whenever an individual submits a government-approved false claim to a third party who happens to owe an unrelated debt to a government agency." Id. at *4-5.

In its amicus curiae brief, the government contends the District Court improperly implied that a False Claims Act plaintiff who alleges the defendant caused an intermediary to submit a false claim on its behalf must establish that the intermediary had control over the government funds. To the extent the District Court's opinion implies an "intermediary control" requirement, we agree with the government that the District Court erred. The proper inquiry under the False Claims Act is not whether an intermediary controls government funds for any period of time but whether the defendant causes,

or will cause, the intermediary to make a false claim against the government resulting in a financial loss to the treasury. See, e.g., Neifert-White Co., 390 U.S. at 233; Rainwater, 356 U.S. at 591. Several cases recognize that a plaintiff may assert a cause of action under the False Claims Act even when an intermediary, such as a subcontractor, is merely a conduit to the transfer of government funds. See, e.g., Bornstein, 423 U.S. at 309; United States v. Ueber, 299 F.2d 310, 313 (6th Cir. 1962). The intermediary need not have discretion over, or even possession of, the government funds to establish that the defendant violated the False Claims Act. Therefore, we reiterate that the proper inquiry under the False Claims Act is whether the defendant made fraudulent claims that caused ***or would cause*** economic loss to the United States Treasury.

D.

On appeal, Hutchins contends Wilentz, Goldman & Spitzer's submission of fraudulent legal bills to the Bankruptcy Court constitutes a reverse false claim in

violation of § 3729(a)(7). He argues that if the government were a creditor to a bankrupt estate, it would suffer "economic loss" by reason of the estate paying inflated legal bills.

The False Claims Act recognizes that a party may be liable for a reverse false claim if he "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). But in his complaint, Hutchins never asserted a reverse false claim cause of action under 31 U.S.C. § 3729(a)(7), nor did he allege the government was a creditor in any of the bankrupt estates in which Wilentz, Goldman & Spitzer submitted inflated legal bills.

As noted, the District Court dismissed Hutchins's claim on a Fed. R. Civ. P. 12(b)(6) motion. Our review therefore is limited to reviewing the claims alleged in his

complaint.[16] Because Hutchins did not plead this cause of action, nor file a motion to amend his complaint to raise this cause of action, we will not address his reverse false claim argument on appeal.

IV.

Hutchins also alleges that Wilentz, Goldman & Spitzer fired him in retaliation for his investigation and reporting of fraud in violation of 31 U.S.C. § 3730(h). Section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section,

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[16] See, e.g., Mahone v. Addicks Utility Dist. of Harris County, 836 F.2d 921, 935 (5th Cir. 1988) ("It is black-letter law that `[a] motion to dismiss for failure to state claim under Federal Rule Civil Procedure 12(b)(6) is to be evaluated only on the pleadings.' ") (quoting Jackson v. Procunier, 789 F.2d 307, 309 (5th Cir. 1986)); see also 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1356 (2d ed. 1990).

including investigation for, initiating of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

This so called "whistleblower" provision protects employees who assist the government in the investigation and prosecution of violations of the False Claims Act. Neal v. Honeywell Inc., 33 F.3d 860, 861 (7th Cir. 1994). Congress enacted § 3730(h) "to encourage any individuals knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266. "[F]ew individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." Id. at 5300. Therefore, § 3730(h) broadly protects employees who assist the government in prosecuting and investigating False Claims Act violations.

A plaintiff asserting a cause of action under §3730(h) must show (1) he engaged in "protected conduct,"

(i.e., acts done in furtherance of an action under § 3730) and (2) that he was discriminated against because of his "protected conduct." United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5300). In proving that he was discriminated against "because of "conduct in furtherance of a False Claims Act suit, a plaintiff must show that (1) his employer had knowledge he was engaged in "protected conduct"; and (2) that his employer's retaliation was motivated, at least in part, by the employee's engaging in "protected conduct."[17] Id.;

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[17] The requirement that employers have knowledge that an employee is engaged in "protected conduct" ensures that § 3730(h) suits are only prosecuted where there has been actual retaliation. Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir. 1994) (quoting S. Rep. No. 99-345, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300), cert. denied, 513 U.S. 1154 (1995). As the Court of Appeals for the Seventh Circuit has noted, knowledge on the part of the employer is necessary because,

> Some employees will cry "fraud" to make pests of themselves, in the hope of being bought off with higher salaries or more desirable assignments. Others will perceive the disappointments of daily life as "retaliation" and file suits that have some settlement value because of

see also Zahodnick v. Int'l Bus. Machines Corp., 135 F.3d 911, 914 (4th Cir. 1997). At that point, the burden shifts to the employer to prove the employee would have been terminated even if he had not engaged in the protected conduct. Mikes v. Strauss, 889 F. Supp. 746, 754 (S.D.N.Y. 1995).

At issue here is whether Hutchins engaged in "protected conduct," and whether Wilentz, Goldman & Spitzer was on notice that he was pursuing (i.e., acting in furtherance of) a False Claims Act suit and retaliated against him. Hutchins claims he engaged in three activities that were "protected conduct" that put his employer on notice that he was investigating and pursuing a potential False Claims Act suit. First, he cites the memorandum he wrote to Louis DeLucia concerning the law firm's "practice" of overcharging clients for Westlaw and LEXIS research costs.

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the high costs of litigation and the possibility of error. Neal, 33 F.3d at 863.

Second, he points to his inquiry to Marie Henneberry, the paralegal supervisor, about this billing practice as well as the practice of using paralegals to perform secretarial functions resulting in inflated client bills. Finally, he cites his request for billing documents from the accounting department.

In granting defendant's motion for summary judgment, the District Court found Hutchins failed to engage in "protected conduct" and that Wilentz, Goldman & Spitzer was not on notice of potential False Claims Act litigation when it fired him. The court found Hutchins's investigation and reporting of the Westlaw and LEXIS billing practice was not "protected conduct" because,

> plaintiff only looked into the firm's research costs because his supervisor, defendant DeLucia, asked him to. The memo and all research involved, was therefore, the product of a specific assignment given to him by his supervisor. It was not the result of plaintiff's independent investigation prompted by a suspicion of fraud upon the government.

Hutchins II, slip. op. at *13. Additionally, the court stated,

> [T]he record is clear that at no point did plaintiff complain or express any objection to the firm's alleged policy of inflating research costs. He merely performed the limited billing research his supervisor asked of him, wrote his findings down in an inter office memo, and submitted it to DeLucia.

Id. at *15. Finally the court stated,

> [Hutchins] fail[ed] to establish facts that demonstrate he alerted his employer, or acted so as to put it on notice, that he was investigating alleged wrongdoings and might be reporting them. Plaintiff 's assertions that he knew about unlawful practices, standing alone, without facts to support a finding that defendant fired him in retaliation for investigating and possibly reporting what he discovered, do not constitute enough evidence to support his federal claim in this action.

Id. at *16.

A.

An employee must engage in "protected conduct" in order to assert a claim under § 3730(h). In addressing what activities constitute "protected conduct," the "case law indicates that `protected [conduct]' requires a nexus with the `in furtherance of ' prong of [a False Claims Act] action." McKenzie v. Bellsouth Telecomm, Inc., 219 F.3d 508, 515 (6th Cir. 2000). This inquiry involves deter mining "whether [plaintiff 's] actions sufficiently furthered `an action filed or to be filed under' the [False Claims Act] and, thus, equate to `protected [conduct].' " Id. at 516. Section 3730(h) specifies that "protected conduct" includes "investigation for, initiating of, testimony for, or assistance in" a False Claims Act suit. 31 U.S.C. § 3730(h).

Determining what activities constitute "protected conduct" is a fact spécific inquiry. But the case law indicates that "the protected conduct element . . . does not require the plaintiff to have developed a winning qui tam action . . . . It only requires that the plaintiff engage [ ] in `acts . . . in furtherance of an action under [the

False Claims Act].' " Yesudian, 153 F.3d at 739 (quoting 31 U.S.C. § 3730(h)). Under the appropriate set of facts, these activities can include internal reporting and investigation of an employer's false or fraudulent claims. Id. at 742 ("[It] would [not] . . . be in the interest of law-abiding employers for the [False Claims Act] to force employees to report their concerns outside the corporation in order to gain whistleblower protection. Such a requirement would bypass internal controls and hotlines, damage corporate efforts at self-policing, and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers."); see also Childree v. UAP/GA Chem, Inc., 92 F .3d 1140, 1146 (11th Cir. 1996), cert. denied, 519 U.S. 1148 (1997); Hopper, 91 F.3d at 1269 ("[P]laintiff must be investigating matters which are calculated, or reasonably could lead to a viable [False Claims Act] action."); Neal, 33 F.3d at 864. "Mere dissatisfaction with one's treatment on the job is not, of course, enough. Nor is an employee's investigation of nothing more than his employer's non-

compliance with federal or state regulations." Yesudian, 153 F.3d at 740 (citing Hopper, 91 F.3d at 1269); see also Zahodnick, 135 F.3d at 914 ("Simply reporting his concern of a mischarging to the government to his supervisor does not suffice to establish that Zahodnick was acting `in furtherance of' a qui tam action."); United States ex r el. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1523 (10th Cir. 1996).

As noted, employees need not actually file a False Claims Act suit to assert a cause of action under § 3730. Requiring an employee to actually file a qui tam suit would blunt the incentive to investigate and report activity that may lead to viable False Claims Act suits. The False Claims Act was enacted to encourage parties to report fraudulent activity and was intended to "protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together ." Yesudian, 153 F.3d at 740 (citing Neal, 33 F .3d at 864).

B.

As noted, the False Claims Act also requires employees to prove they were discriminated against "because of " their "protected conduct." To meet this requirement, a plaintiff must show his employer had knowledge that he was engaged in "protected conduct" and that the employer retaliated against him because of that conduct. Several courts of appeals have held that the knowledge prong of § 3730 liability requires the employee to put his employer on notice of the "distinct possibility" of False Claims Act litigation. Yesudian, 153 F.3d at 740; Childree, 92 F.3d at 1146; Hopper, 91 F.3d at 1269; Neal, 33 F.3d at 864. We agree with this formulation.

An employer's notice of the "distinct possibility" of False Claims Act litigation is essential because without knowledge an employee is contemplating a False Claims Act suit, "there would be no basis to conclude that the employer harbored [§ 3730(h)'s] prohibited motivation [i.e., retaliation]." Mann v. Olsten Certified Healthcare Corp., 49 F. Supp.2d 1307, 1314 (M.D. Ala. 1999).

Courts have recognized "the kind of knowledge the [employer] must have mirrors the kind of activity in which the [employee] must be engaged. What [the employer] must know is that [the employee] is engaged in protected activity .. . -- that is, in activity that reasonably could lead to a False Claims Act case."[18] Yesudian , 153 F.3d at 742.

"Merely grumbling to the employer about job dissatisfaction or regulatory violations does not satisfy the requirement - just as it does not constitute protected conduct in the first place."
Id. at 743. As one court has stated, the inquiry into whether an employee puts his employer on notice is

[w]hether the employee engaged in conduct from which a fact finder could reasonably conclude that the employer could have feared that the employee was

[18] We note that the "protected conduct" and notice requirements are separate elements of a prima facie case of retaliation under § 3730. But as several circuits have recognized, the inquiry into these elements involves a similar analytical and factual investigation. See, e.g., Yesudian, 153 F.3d at 742.

contemplating filing a qui-tam action against it or reporting the employer to the government for fraud . . . . [L]itigation . . . [is] a "distinct possibility" only if the evidence reasonably supports such fear; if the evidence does not support this fear, litigation would not have been a distinct possibility.

Mann, 49 F. Supp.2d at 1314; see also McKenzie, 219 F.3d at 514-15; Yesudian, 153 F.3d at 741-45; Neal, 33 F.3d at 863-865.

Whether an employer is on notice of the "distinct possibility" of False Claims Act litigation is also a fact specific inquiry. While "[a]n employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation," Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir.), cert. denied, 528 U.S. 1038 (1999), the employer is on notice of the "distinct possibility" of litigation when an employee takes actions revealing the intent to report or assist the government in the investigation of a False Claims Act violation.

C.

1.

In most retaliation cases under § 3730(h), the two critical questions are (1) what sort of activity constitutes "protected conduct," and (2) whether the employer was on notice that the employee was engaging in "protected conduct."[19] Because the inquiry into these questions is intensely factual, we will examine reported cases that review whether an employee engaged in "protected conduct" and whether this conduct was sufficiently linked to the investigation of a False Claims Act suit that it put the employer on notice of the "distinct possibility" of litigation.

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[19] As noted a prima facie case of retaliation under § 3730 requires proof that the plaintiff (1) engaged in "protected conduct," (i.e., acts done in furtherance of an action under § 3730) and (2) that the plaintiff 's employer discriminated him because of his "protected conduct." In proving that he was discriminated against "because of " his activities in furtherance of a False Claims Act suit, a plaintiff must show that (1) his employer had knowledge that he was engaged in "protected conduct"; and (2) that his employer's retaliation was motivated, at least in part, by the plaintiff 's engaging in "protected conduct."

In Neal, 33 F.3d 860, an employee who worked at the Joliet Army Arsenal Plant concluded her co-workers were falsifying ammunition test data reports. She reported this activity to her supervisor and to her employer's office of legal counsel. The employer's legal counsel then notified the United States Army which conducted an investigation and found plaintiff's fraud allegations were true. The Court of Appeals for the Seventh Circuit found the plaintiff engaged in "protected conduct" and put her employer on notice of the "distinct possibility" of False Claims Act litigation when she reported the fraud to her employer's legal counsel. Specifically, the court noted that plaintiff "conducted her own investigation and reported her findings through corporate channels, leading to two additional investigations: one by [the defendant] and a second by the Army." Id. At 865.

In Yesudian, 153 F.3d 731, the Court of Appeals for the D.C. Circuit found an employee of Howard University who worked in the purchasing department engaged in "protected conduct" when he reported to

upper-level University officials that his supervisor was engaged in fraudulent activity. The plaintiff reported, among other things, that his supervisor submitted false time and attendance records, received bribes from vendors, and made payments to vendors who did not provide services to the University. The court held the plaintiff engaged in "protected conduct" and put the University on notice of the "distinct possibility" of a False Claims Act suit because he repeatedly advised his superiors that he had evidence of false records. He wrote several letters to his supervisors and to the University President and Vice-President detailing what he believed was illegal conduct that fraudulently resulted in the loss of government money. He also collected evidence from employees to corroborate his claims and took photographs of evidence. The Court of Appeals for the D.C. Circuit held these reporting actions put the University administration, and plaintiff 's immediate supervisors, on notice of the "distinct possibility" of False Claims Act litigation. Id. At 744-45; see also Hopkins-v. Actions, Incorp. of Brazoria County, 985

F.Supp. 706, 709-10 (S.D.T ex. 1997) (holding plaintiff who reported to chairman of company that employees were illegally using Medicare funds for payroll costs, as well as informed him that she intended to report this activity to the government, engaged in "protected conduct" that put employer on notice of the "distinct possibility" of litigation).

Not all complaints by employees to their supervisors put employers on notice of the "distinct possibility" of False Claims Act litigation. In Robertson, 32 F .3d 948, the Court of Appeals for the Fifth Circuit found an employee did not engage in "protected conduct" nor did he put his employer on notice of potential False Claims Act litigation when he reported to his supervisors that the company was billing the government for various helicopter projects without properly substantiating the charges. The court noted the plaintiff "never used the terms `illegal,' `unlawful' or `qui tam action' in characterizing his concerns about [the] charges." Id. at 951; see also Mann, 49 F.Supp.2d at 1307.

In Zahodnick, 135 F.3d 911, the Court of Appeals for the Fourth Circuit found a managing engineer at IBM whose job duties included assembling cost information for proposals to the Defense Intelligence Agency did not engage in "protected conduct" and failed to put his employer on notice of the "distinct possibility" of a False Claims Act suit. In Zahodnick, plaintiff engineer reported to his supervisor that employees were overcharging the government for the amount of time they worked on government projects. The court stated,

The record discloses that Zahodnick merely informed a supervisor of the problem and sought confirmation that a correction was made; he never informed anyone that he was pursuing a qui tam action. Simply reporting his concern of mischarging to the government to his supervisor does not establish that Zahodnick was acting "in furtherance of " a qui tam action.

Id. at 914 (citing Robertson, 32 F .3d at 951).

Last year in McKenzie, 219 F.3d 508, the Court of Appeals for the Sixth Circuit held a dispatcher for

BellSouth, whose regular job duties included processing complaints about telephone service and closing "trouble reports" once telephone repairs were made, did not engage in "protected conduct" nor put her employer on notice of potential False Claims Act litigation when she complained to her supervisors that BellSouth was falsifying reports. It was BellSouth's policy that if repairs were not made within twenty-four hours of being reported, the customer was entitled to a refund for the period of time that telephone service was disrupted. Plaintiff alleged that various employees falsified time reports when outages were reported and when repairs were completed so that BellSouth could avoid paying reimbursements to customers, including several government agencies. Plaintiff complained to her supervisors about this practice and on one occasion showed her supervisor a newspaper article about a consumer fraud investigation by the Florida state attorney general. She also refused to falsify repair records. The court found the plaintiff did not engage in "protected conduct" reasoning that "when McKenzie

brought her complaints to the attention of the BellSouth auditor and her supervisors, legal action was not a reasonable or distinct possibility . . . because [her complaints were] not sufficiently connected to exposing fraud or false claims against the federal government." Id. at 516-17. The court stated the newspaper article McKenzie showed her supervisor "did not relate to a qui tam action and only discussed a consumer fraud investigation by the Florida state attorney general." Id. at 518. Additionally, the article was widely circulated and disseminated throughout the office. The court also reasoned that "although the newspaper article distributed and posted by McKenzie shows awareness of consumer fraud, the `in furtherance of' language requires more than merely reporting wrongdoing to supervisors." Id. at 516. The court stated that McKenzie's "numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government." Id. At 517. Therefore, McKenzie did not put BellSouth on notice of the "distinct possibility" that she might pursue

a False Claims Act suit or inform the government that BellSouth's fraudulent conduct was causing an economic loss to the government.

These cases are illustrative of the general rule that a successful cause of action under § 3730 requires an employee to prove that he engaged in "protected conduct," that is conduct in furtherance of a False Claims Act suit, and that his employer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against him because of his "protected conduct." As noted, this is a fact specific inquiry.

2.

Although reporting "fraudulent" and "illegal" activity to an employer may satisfy the "protected conduct" and notice requirements in many § 3730(h) cases, in some instances where an employee's job duties involve investigating and reporting fraud, the employee's burden of proving he engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of

False Claims Act litigation is heightened. As the Court of Appeals for the Fourth Circuit held in Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 868 (4th Cir. 1999), "If an employee is assigned the task of investigating fraud within the company, courts have held that the employee must make it clear that the employee's actions go beyond the assigned task [in order to allege retaliatory discharge under § 3730(h)]." The court stated that when an employee is assigned the task of investigating fraud, "such persons must make clear their intentions of bringing or assisting in a [False Claims Act] action in order to overcome the presumption that they are merely acting in accordance with their employment obligations." Id. This requirement is consistent with the understanding that the employer must be put on notice that the employee is contemplating a potential False Claims Act suit before liability will attach under § 3730(h).

In Ramseyer, 90 F.3d at 1523, the Court of Appeals for the Tenth Circuit found a plaintiff who was the clinical director of a mental health facility, whose

responsibilities included monitoring compliance with applicable Medicaid requirements, did not engage in "protected conduct" when she reported to her superiors that the facility was not complying with various Medicaid requirements. The court reasoned that these reports to her supervisors, without more, did not put defendants on notice of a potential qui tam suit because the reporting was part of plaintiff 's job duties. The court stated,

> Plaintiff never suggested to defendants that she intended to utilize [their] non compliance in furtherance of a [False Claims Act] action. Plaintiff gave no suggestion that she was going to report such noncompliance to government officials, nor did she provide any indication that she was contemplating her own qui tam action. Rather, the monitoring and reporting activities described in plaintiff 's complaint [i.e., reporting to her superiors] were exactly those activities plaintiff was required to

undertake in fulfillment of her job duties, and plaintiff took no steps to put defendants on notice that she was acting" in furtherance of " a [False Claims Act] action.

Id. at 1523 (internal citations omitted).

In Robertson, 32 F.3d at 952, the Court of Appeals for the Fifth Circuit held a senior contract administrator with the Army Helicopter Improvement Program, who was responsible for ensuring that costs were properly charged to the government and requests for additional government funding were properly substantiated, did not engage in "protected conduct" when he reported to his superiors that certain requests for additional government funding were not properly substantiated. In Robertson, plaintiff investigated and tried to verify the requests for funding and over the course of several months reported his findings to his superiors. The court found this activity was not protected because plaintiff " `did nothing to rebut his supervisor's testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job

responsibilities in furtherance of a qui tam action.' " Id. (quoting district court opinion). The court reasoned that plaintiff "never characterized his concerns as involving illegal, unlawful, or false-claims investigations . . . . [There is] no evidence that [plaintiff] expressed any concerns to his superiors other than those typically raised as part of a contract administrator's job." Id.

Even though an employee's job duties include investigating or reporting fraud, the employee may still engage in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation. In Eberhardt, 167 F .3d at 868, the Court of Appeals for the Fourth Circuit stated an employee can put his employer on notice

> by expressly stating an intention to bring a qui tam suit, . . [or by engaging in] any action which a fact finder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility. Such actions would include, but are not limited to, characterizing the employer's conduct as illegal or fraudulent or recommending that legal

counsel become involved. These types of actions are sufficient because they let the employer know, regardless of whether the employee's job duties include investigating potential fraud, that litigation is a reasonable possibility.

In Eberhardt, 167 F.3d at 868, a senior staff vice-president whose job duties included organizing his employer's accounting system engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of False Claims Act litigation when he began investigating his employer's charges to the United States State Department for work not actually performed. Although plaintiff 's job duties required him to investigate fraud, the court found he engaged in "protected conduct." The court reasoned plaintiff reported to his employer that the charges were "illegal." Id. Additionally, he informed his employer that it was advisable to obtain legal counsel. The court concluded these activities were sufficient to put his employer on notice of potential False Claims Act litigation. Id.; see also Mann, 49 F. Supp.2d at 1316 (employee whose job duties included reporting

and investigating compliance with Medicare regulations did not put employer on notice of False Claims Act litigation when she reported billing overcharges to supervisor because this reporting was part of her regular job duties, however when she reported this information to her employer's legal department she engaged in protected conduct).

D.

We fail to see how Hutchins engaged in "protected conduct." Similarly, we do not believe that Wilentz, Goldman & Spitzer was on notice of the "distinct possibility" of False Claims Act litigation and retaliated against Hutchins because of his "protected conduct." Hutchins never threatened to report his discovery of the firm's Westlaw and LEXIS billing practices to a government authority, nor did he file a False Claims Act suit until after he was terminated. Childree, 92 F.3d at 1146. Furthermore, Hutchins never informed his supervisors he believed this billing practice was "illegal," Ramseyer, 90 F.3d at 1523, or that the practice

was fraudulently causing government funds to be lost or spent. Robertson, 32 F .3d at 951. Nor did he advise his employer that corporate counsel be involved in the matter. Eberhardt, 167 F.3d at 869. Rather, in a single memorandum he stated, "I was told the firm has a policy whereby actual Westlaw and LEXIS expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for." As held in Zahodnick, 135 F.3d at 914, "simply reporting [a] concern of mischarging . . . does not establish that [plaintiff] was acting in furtherance of a qui tam action." Hutchins's memorandum merely stated, as a matter of fact, the firm's policy of passing on Westlaw charges to clients. The memorandum did not inform Wilentz, Goldman & Spitzer that he intended to use this information in furtherance of a qui tam action or that he was going to report it to government authorities because he believed the law firm was defrauding the government. Robertson, 32 F.3d at 952; Mikes, 889 F. Supp. at 753 (plaintiff must show employer was on notice that she was "laying the groundwork for legal action").

Nor did Hutchins's complaint to Marie Henneberry about the practice of paralegals performing secretarial tasks put the law firm on notice of the "distinct possibility" of False Claims Act litigation. Hutchins approached Henneberry only to "confirm basically that [another paralegal] had talked to her about [using paralegals for secretarial tasks]," never advising Henneberry that he thought the practice was illegal or fraudulently causing loss of government funds.[20] Similar to the plaintiff in Zahodnick, Hutchins "merely informed a supervisor of a problem and sought confirmation that a correction was made." 135 F.3d at 914. As held in Luckey, "An employer is entitled to treat a suggestion for improvement as what it purports to be rather than a precursor to litigation." 183 F .3d at 733. Because Hutchins's single discussion with Henneberry did not allege fraud, illegality or a potential False Claims Act suit, we fail to see how the conversation put Wilentz, Goldman & Spitzer on notice of the "distinct possibility"

[20] Hutchins told Henneberry that he thought the practice was "unethical."

of False Claims Act litigation. McKenzie, 219 F.3d at 516 (plaintiff "must sufficiently allege activity with a nexus to a qui tam action, or fraud against the United States Government").

Hutchins claims that aside from his "reporting" (the memorandum to DeLucia and his conversation with Henneberry), he was involved in the initial investigation of a potential False Claims Act suit. See Yesudian, 153 F.3d at 740 (Section 3730(h) "protect[s] employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together."). He contends his discussion with Marie Henneberry about the Westlaw and LEXIS charges and his request for billing documents from the accounting department constituted "investigation" that put Wilentz, Goldman & Spitzer on notice of the "distinct possibility" of False Claims Act litigation. We disagree.

Hutchins's "investigation" was in response to a specific assignment from Louis DeLucia who asked him to determine why certain clients' computerized research costs were so high. Hutchins's inquiry to Henneberry

about the practice was not the result of his independent suspicions that the firm was involved in fraud. As held in Eberhardt, 167 F.3d at 868, if an employee is assigned the task of investigating fraud within the company, that employee must make it clear that his investigatory and reporting activities extend beyond the assigned task in order to allege retaliatory discharge under § 3730(h). We see no evidence that Hutchins engaged in any conduct, beyond what was specifically asked of him in accordance with his job duties, that gave any indication that he was investigating fraud for a potential False Claims Act suit. He did not communicate that he was going to report the activity to government officials nor that he was contemplating his own qui tam suit. Robertson, 32 F.3d at 952. He did not use the terms "illegal" or "fraud" nor did he attempt to discuss the billing practice with corporate counsel. Eberhardt, 167 F.3d at 869; Neal, 33 F.3d at 865. Rather , he merely performed the task he was asked to complete by his supervisor . Ramseyer, 90 F.3d at 1523; Mann, 49 F. Supp.2d at 1316.

Hutchins contends his "investigation" into Westlaw and LEXIS billing was not part of his job duties. He argues that unlike the plaintiffs in Robertson, Ramseyer and Eberhardt, his job description as a paralegal did not contain "monitoring or reporting" activities, nor was he a "fraud investigator." Nonetheless, his inquiry into the Westlaw and LEXIS billing was in furtherance of his job duties. Because he performed the investigation at the direct request of his supervisor, there was no reason to believe that Hutchins would use the information he obtained to bring a qui tam suit. Eberhardt, 167 F.3d 868 ("[An] employee must make it clear that [his] actions go beyond the assigned task."); Robertson, 32 F.3d at 952 (employee not engaged in "protected conduct" because his "actions were consistent with the performance of his [job] duty").

As § 3730(h) makes clear, without notice of an employee's intent to file or assist in a False Claims Act suit, an employer does not engage in prohibited retaliatory conduct under § 3730(h) when it terminates

or demotes that employee. McKenzie, 219 F.3d at 516. Here, Wilentz, Goldman & Spitzer was not on notice that Hutchins was contemplating a qui tam suit. Regardless of his job description, Hutchins's "investigation" into the firm's billing practice resulted from a direction from his employer.

Finally, we do not believe Hutchins's request for billing documents from the accounting department was protected investigatory conduct that put the law firm on notice of the "distinct possibility" of False Claims Act litigation and therefore evidence that the law fir m retaliated against him. As the record makes clear, Wilentz, Goldman & Spitzer decided to fire Hutchins before he requested these documents. Because the law firm was unaware of Hutchins's request for these documents when it decided to fire him, it did not retaliate against him in violation of § 3730(h) because of his "investigation" into the firm's accounting files.

Hutchins has failed to assert a prima facie case of retaliatory discharge under § 3730(h). By failing to

prove that he engaged in "protected conduct" and that he put his employer on notice of the "distinct possibility" of False Claims Act litigation, Hutchins, as a matter of law, cannot prove a violation of § 3730(h). We agree with the District Court that Wilentz, Goldman & Spitzer did not terminate Hutchins in retaliation for his "investigation" in furtherance of a False Claims Act suit.

V.

For the foregoing reasons, we will affirm the District Court's dismissal of Hutchins's qui tam claims. We also will affirm its grant of summary judgment for Wilentz, Goldman & Spitzer on the retaliatory discharge claims.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX 10

The Federal False Claims Act

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to

conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $10,000, plus 3 times the amount of damages which the

Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for

the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of

section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this

section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to

the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's

participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court,

without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any

administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *qui tam* plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person

substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action

under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the

person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from

the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section,

including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS | 3730] may be served at any place in the

United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall

estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
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§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws

of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Request No. 10: Identify all persons with knowledge and all circumstances concerning the decision at any time to eliminate LEXIS and Westlaw charges from the fee application for the Winkleman bankruptcy and identify all documents concerning same.

There was no decision made to eliminate Lexis and Westlaw charges from the fee application for the Winkleman bankruptcy. See fee application, annexed hereto as Exhibit J.

Request No. 14: Identify the total amount and the amount of each element of the expenses associated by Wilentz with the operation and maintenance of Westlaw and LEXIS services and identify all documents evidencing or concerning same.

The establishment of the 1.5 factor occurred over 20 years ago, and there is no documentation regarding the establishment of this factor. Upon information and belief, the decision to utilize the 1.5 multiplier was made in accordance with other firms' practice of using the multiplier. It

represented an attempt to recapture direct and indirect costs, such as overhead.

With regard to the manner in which an .item may be retrieved from WG&S's word processing/billing system, WG&S uses a document management system (PCDocs) to save documents. The firm currently has over 841,000 documents on the network. A program which allows a quick and efficient means to save and retrieve work product is essential.

In order to save a document on the network a document profile must be completed. This profile requires specific information. For example, you must fill in an Author, Document Name, Responsible Attorney and Client/ Matter Number. The program enters specific information automatically, such as Entered By name and a Document Number. The program also automatically tracks the number of keystrokes and the time spent creating the document. The

his entire tenure at Wilentz. Defendants deny the allegation contained in the second sentence of Paragraph Twelve of the Complaint.

13. Defendants admit that plaintiff assisted in the preparation of certain fee applications to be submitted to the Bankruptcy Court, but deny the remainder of the allegations contained in Paragraph Thirteen of the Complaint.

14. Defendants admit that defendant DeLucia was the bankruptcy trustee in the Winkleman bankruptcy, but deny remainder of the allegations contained in Paragraph Fourteen of the Complaint.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff made such a request to a clerk in the information services department. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegation contained in the second sentence of Paragraph Fifteen of the Complaint. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegation

that plaintiff was advised of defendant Wilentz's policy on Westlaw and Lexis expenses, but admit that at that time defendant Wilentz had a policy, applicable to all clients, of multiplying Westlaw and Lexis charges by 1.5 for billing purposes to cover expenses associated with the operation and maintenance of the Westlaw and Lexis services.

The practice of using the 1.5 multiplier was discontinued on January 1, 1996.

Request No. 23: Correspondence between Joan Lavery and Wilentz and/or Louis DeLucia relating to this case.

On or about February 20, 1997, a draft proposed answer to plaintiff's complaint was transmitted by Kirsten Scheurer, Esq. of WG&S to Joan Lavery, Esq. This transmission is protected from production by the attorney-client and/or work product privilege. No other such document exists.

INTERROGATORIES:

Request No. 6: Describe in detail the process by which defendant Wilentz determined the number of photocopies made (including a description of any computer generated information) and the expense (including each component item thereof and the amount thereof) of such photocopies, set forth in its bills to clients. Identify each person involved in the process, and identify all documents and communications concerning such process.

Each WG&S client was assigned a client/matter number. There was a keyboard located at each photocopier, on which the client/matter number was keyed in prior to making photocopies. As a result, that automatically goes into the computer, along with the number of pages and the charge per page, and is posted to the client's file. The computer then generates a bill, which is forwarded to the billing attorney. The attorney then reviews the bill to determine whether to bill all, none, or some portion of the photocopy charge. The cost per page is not varied.

The charge for photocopying was reduced from 20 cents per page to 10 cents per page on January 1, 1996. See New Jersey Law Firm Disbursement Recovery Survey Results, annexed hereto as Exhibit D (which has been redacted to delete confidential information which is not responsive to this request); November 8, 1995 memorandum to Management Committee from Bruce R. Wright, Jr., annexed

hereto as Exhibit E (which has been redacted to delete confidential information which is not responsive to this request); Spreadsheet entitled "Sheet 1," annexed hereto as Exhibit F; January 17, 1996 Memorandum to All Attorneys from Bruce R. Wright, Jr., annexed hereto as Exhibit G (which has been redacted to delete confidential information which is not responsive to this request); Spreadsheet entitled "Per Unit Cost-Photocopy 1994", annexed hereto as Exhibit H; and Excerpts of Minutes of Management Committee Meeting, August 29, 1995, annexed hereto as Exhibit I (which has been redacted to delete confidential information which is not responsive to this request).

Request No. 8: Describe in detail all communications at any time among employees and/or partners of Wilentz and/or between Wilentz and any third party which resulted in or led to the decision pursuant to which Wilentz discontinued the practice of multiplying the actual charges made by Westlaw and LEXIS by 1.5 for purposes of billing its clients or otherwise seeking reimbursement of such expenses, and identify all documents which evidence or concern such decision.

During the 1990s, clients began to challenge disbursement charges appearing on their bills, and the competition began to take a hard look at the amounts being charged to clients and began to make adjustments. During the Summer of 1995, Bruce R. Wright, Jr. was given a directive by the WG&S Management Committee to prepare a survey of New Jersey law firms concerning disbursement recovery. This survey, attached hereto as Exhibit D (which has been redacted to delete confidential information

AFFIDAVIT OF CHARLES T. HUTCHINS

STATE OF NEW JERSEY :
: S.S.
COUNTY OF MIDDLESEX :

Charles T. Hutchins, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I worked at the law offices of Wilentz, Goldman & Spitzer (hereafter "WG&S") from. January 1993 until October 2, 1995. I have personal knowledge of the facts and circumstances set forth herein.

2. My immediate supervisor at WG&S was Louis DeLucia (hereafter "DeLucia") until August 1995. In August 1995 Patricia Gardner (hereafter "Gardner") was designated, by Louis DeLucia, as the bankruptcy team paralegal supervisor.

3. On or about August 2, 1995 I received an assignment from DeLucia (WG&S partner and leader of the Creditor's Rights litigation team) to research and document why the Lexis electronic research fees on the billing memo seemed so high in the Herman & Rita

Winklemann bankruptcy. DeLucia is the bankruptcy estate trustee in this case.

4. Pursuant to this request I had Betty Foy in accounting run a PT&E (expense report) on the Lexis research fees for this client matter. The billing memo figures were an identical match with the PT&E figures.

5. I then went to Information Services Department ("ISD") and had the clerk, Debbie Kim, cross-check the billing memo and PT&E figures against the actual invoices received from Lexis. The actual figures reflected on the Lexis invoice were exactly 2/3rds of the amount reflected on the billing memo. I was told that the firm has a policy whereby actual Westlaw and Lexis expenses are multiplied by 1.5 in order to arrive at the amount the client (or bankruptcy estate, in this instance), is invoiced for. Therefore, a client or bankruptcy estate is invoiced for $1,500 when actual Westlaw or Lexis fees are $1,000 (attorney and paralegal time is billed separately). At Wilentz, Westlaw & Lexis connections are made through Compuserve or Sprintnet, so the calls are local.

6. A memo detailing my findings was prepared (see Exhibit A) and personally handed to DeLucia. A copy was sent to the file. I retained a copy for myself. I also gave him my hand written notes and a copy of the Winklemann PT&E. He read the memo and walked back into his office without comment.

7. I subsequently (in late August or early September) attempted to discuss these electronic legal research overcharges with DeLucia, but he brushed me off, indicating that he did not have time to discuss the matter.

8. On October 2, 1995, at 10:00 a.m., in an attempt to determine the extent and duration of these billing irregularities, I requested Westlaw, Lexis, and copying costs PT&E reports on approximately 15 Creditor Committee and Trustee cases from Betty Foy in accounting on the 8th floor. The cases I requested information on included Flagstaff Realty, Metroplaza Associates, Virginia Carolina Tools, Winklemann, and Bryan. At 12:00 noon on October 2, 1995, I was terminated without notice and without severance pay. I

was escorted from the building and was not permitted to take my personal copies of my time sheet entries.

9. I first began preparing fee applications for Creditor Committee and Trustee cases in February 1993 (originally in the capacity as a paralegal intern). When computing the calculations for copying costs (for itemization on the Fee Application Cover Sheet) I was instructed to divided the amount of copying costs reflected on the billing memo by twenty cents (the maximum amount that could be charged per copy). This would give me the total number of copies made during the Application Period. Problems arose when the dollar amount reflected on the billing memo for copying costs ended with a nickel. When I brought this to the attention of DeLucia he told me it was firm policy to charge twenty-five cents per copy, not the bankruptcy court authorized maximum of twenty cents. Since this odd-looking number would stick out on the invoice submitted to the court, I was instructed (1) to re-type the expense portion of the invoice, (2) to round down the copying cost figure to a number ending in zero, (3) to

adjust another expense item upwards by five cents to balance out the copying cost reduction, (4) to cut off the expense portion of the computer generated invoice, (5) to replace the severed invoice section with the fraudulent substitute expense itemization, and (6) to attach this entire document as an exhibit to the Application for Fees.

10. This situation persisted throughout 1993. At some time in 1994 I became aware that the dollar amounts for copying costs stopped ending with a nickel. I am unaware if that resulted from a reduction of the copying costs to twenty cents per copy, or if it resulted from an increase of the copying costs to thirty cents. To this day the paralegals never see the actual numbers of copies made during the Application Period, but rather continue to calculate the number of copies made by dividing the amount reflected on the billing memo by twenty cents.

11. I have been informed by Corinne Ryan Herman, the paralegal who preceded me and who initially trained me at WG&S, that WG&S was charging twenty-five cents per copy on Creditor Committee and Trustee Fee

Applications throughout 1992. Corinne Ryan Herman left the employ of WG&S in July of 1993. She is currently employed by AT&T in Basking Ridge, New Jersey.

12. In 1994 DeLucia filed several trustee fee applications (with close-out documents) with the United States Trustee's Office. These fee applications were rejected because DeLucia attempted to bill his time at his hourly rate in addition to submitting a request for payment based on the percentage of assets brought into the estate by the trustee. Also, time spent by the trustee's attorney and paralegals doing work for the trustee (rather than for the trustee's attorney) was disallowed. DeLucia was enraged. I overheard him indicate the need to re—write the time entries on remaining trustee cases so that all the time entries referenced the performance of work for the trustee's attorney rather than for the trustee. I was never instructed to make any such edits, but I believe that Andrew Wagner may have been so instructed.

13. Throughout the Summer of 1995 there was a readily apparent reduction of new Creditor Committee, foreclosure, debtor and bank business for WG&S. In August, to increase paralegal billings, Andrew Wagner (the other bankruptcy paralegal, hereafter "Wagner") and I were instructed by DeLucia and Gardner to now do the filing (hole punching and binding) of pleadings (previously handled by the file clerk (Denise Pietrucha). We were also instructed to take over the typing of indexes to the filed pleadings (previously handled by the legal secretaries). We were directed to be creative and imaginative with how we wrote our time entries so as the firm could be paid for this time. Our time sheet entries were usually recorded as "file maintenance" or "organization, tabbing, binding, and indexing of pleadings." Wagner and I both complained to Marie Hennebery (hereafter "Hennebery"), the firm's paralegal supervisor, about the unethical nature of these assignments. She agreed, and stated her intention to protest the use of bankruptcy paralegals in this manner to DeLucia. Wagner informed me in late September that

Hennebery had informed him that she had voiced her objection to DeLucia twice about the inappropriate utilization of Wagner and myself. She also reported to Wagner that DeLucia intended to continue the practice to see if WG&S was going to be paid for the use of paralegals in this manner, or words to that effect.

14. In August 1995, Wagner and I were also instructed to routinely (weekly) run Pacers searches on all bankruptcy cases our department had been involved in (again, to increase paralegal billings). This instruction was without regard to case activity or pending matters. Although there wasn't sufficient time to run Pacers on all cases each week, several hundred pacer searches were run, without regard to a need for information, between August 1995 and the end of September 1995. These reports were forwarded to DeLucia and Gardner.

Dated this 18th day of October 1995 at Newark, New Jersey.

CHARLES T. HUTCHINS

SUBSCRIBED AND SWORN to before me this 18th day of October 1995 at Newark, New Jersey.

NEW JERSEY NOTARY PUBLIC

JOANNE E. PEARSON
A Notary Public of New Jersey
My Commission Expires 12/14/98

MEMORANDUM

TO: Louis DeLucia

FROM: Chuck Hutchins

DATE: August 2, 1995

RE: Winklemann Lexis Fees

Pursuant to your request I had accounting run a PT&E on the Lexis research fees (see attached). I then went to ISD and cross- checked the PT&E figures against the actual invoices received from Lexis. The actual figures reflected on the Lexis invoice are exactly 2/3rds of the amount reflected on the billing memo. I was told that the firm has a policy whereby actual Westlaw and Lexis expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for. The attached report also shows which billing professionals did Lexis research for this client matter.

Supreme Court, U.S.
FILED
MAY 17 2002

No. 01-1529

In The

Supreme Court of the United States

CHARLES T. HUTCHINS,

Petitioner,

v.

WILENTZ, GOLDMAN & SPITZER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

Petitioner, Charles T. Hutchins, Esq. was employed as a paralegal in the creditors' rights department of the respondent, Wilentz, Goldman & Spitzer, P.C., from March 1993 until his termination on October 2, 1995. Petitioner's Appendix 6, p. 3.

On September 22, 1995, Hutchins was summoned to a meeting to discuss the severe personal problems he had with other employees which threatened his continued employment. Petitioner's Appendix 9, pp. 4-5. Hutchins thought that the real reason for the meeting and for the problems he had experienced at work since May 1995 was the belief that he had authored an anonymous memorandum which had disparaged Andrew Wagner, the other paralegal working in the creditors' rights department. Petitioner's Appendix 9, p. 5. Just three days later, he wrote a six page letter to another paralegal, Kim Haan, accusing her of spreading the rumor that he wrote the "Andrew letter." Petitioner's Appendix 6, pp. 6-7; Petitioner's Appendix 9, p. 5. In the September 25, 1995 letter to Haan, Hutchins catalogued the problems and disappointments he had experienced since May, including "an unqualified invitation to leave the bankruptcy team" in June 1995. Petitioner's Appendix 6, pp. 4-6. Addressing his accusation of Haan, Hutchins wrote at length in what can fairly be described as a threatening manner, referring to his "prior use of guerilla tactics" and his preparedness to "deal with abuse." Petitioner's Appendix 9, pp. 5-6.

Haan found the letter on her desk on September 26, 1995 and brought it to the firm personnel manager, Anne Riegle. She was "visibly upset" and "terrified" of what Hutchins might do to her. Petitioner's Appendix 6, p. 8. On

September 27, 1995, Wilentz, Goldman & Spitzer decided to terminate Hutchins' employment. However, in deference to Haan's specific request, the firm did not notify Hutchins of the decision until after the weekend. Petitioner's Appendix 6, pp. 8-9.

Approximately two weeks after his termination, Hutchins prepared an affidavit which he filed with the United States Trustee, in which he accused Wilentz, Goldman & Spitzer of engaging in billing irregularities in trustee fee applications. Petitioner's Appendix 14. Thereafter, he filed a qui tam complaint and a retaliatory discharge claim, alleging that he was discharged in retaliation for taking action in furtherance of False Claims Act litigation.

In his affidavit, Hutchins stated that on August 2, 1995, he had received an assignment from his supervisor, Louis DeLucia, Esq. to research why the Lexis electronic research seemed so high in a particular bankruptcy. Petitioner's Appendix 14, pp. 1-2, ¶ 3. He stated that he prepared a memo in response which stated that the firm had a policy of applying a 1.5 multiplier to such expenses when billing clients. Petitioner's Appendix 14, p. 3, ¶ 6; Petitioner's Appendix 14, p. 10. The memo was never discussed further with DeLucia, any other supervisor or at the September 22 meeting which addressed the issue of Hutchins' continued employment. Petitioner's Appendix 6, pp. 3-4, 6. Hutchins identified two other activities as actions which were purportedly made in furtherance of False Claims Act litigation: a request for additional billing information made on the day that he was notified of his termination and a conversation with his paralegal supervisor in which he confirmed that another paralegal

had complained about the assignment of secretarial tasks to the paralegals. Petitioner's Appendix 9, pp. 7, 50.

The United States District Court dismissed Petitioner's qui tam claim pursuant to Fed. R.Civ. P. 12(b)(6) and granted summary judgment, dismissing his retaliatory discharge claim. The Court of Appeals affirmed both decisions.[1]

REASONS FOR DENYING CERTIORARI

I

THE COURT OF APPEALS PROPERLY DECLINED TO EXPAND THE SCOPE OF LIABILITY UNDER THE FALSE CLAIMS ACT.

Petitioner contends that a conflict exists between the opinion below and the language of the False Claims Act because the Court of Appeals recognized that the Act "only prohibits fraudulent claims that cause or would cause economic loss to the government." Petitioner's Appendix 9, p. 3. Contrary to Petitioner's contentions, this holding does not conflict with the statute or established precedent. Rather, it is Petitioner's suggested interpretation which is at odds with the clear language of the Act.

[1] In light of the procedural posture of the case, the facts are presented as the lower courts received them, *i.e.*, in the light most favorable to the Petitioner. However, it must be noted that in the petition for writ of certiorari, Petitioner has made certain factual assertions which are utterly unsupported by the record, most notably, the assertions set forth at Petitioner's brief, p. 4, n.2 and at p. 28, n.14.

Petitioner correctly notes that the presentation of a false "claim" is sufficient; that there need not be actual payment by the United States for the statute to be violated. However, Petitioner's argument ignores the fact that "claim" is a defined term in the False Claims Act:

> For purposes of this section, "claim" includes any request or demand whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient **if the United States Government provides any portion of the money** or property which is requested or demanded, **or if the Government will reimburse** such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c) (emphasis added). A critical element of the defined term is that the false "claim" must have the actual or potential effect of "causing the government to pay out money which it would not have otherwise paid." *United States ex rel. Alexander v. Dyncorp., Inc.*, 924 F. Supp. 292, 298 (D.D.C. 1996); see also *United States v. Lawson,* 522 F. Supp. 746, 750 (D.N.J. 1981) ("[O]nly 'actions which have the purpose and effect of causing the government to pay out money are clearly 'claims' within the purpose of the Act.'" (quoting *United States v. Silver,* 384 F. Supp. 617, 620 (E.D.N.Y. 1974), *aff'd o.b.*, 515 F.2d 505 (2d Cir. 1975)). Yet, Petitioner fails to cite 31 U.S.C. § 3729(c) or the fact that it defines "claim" anywhere in his argument.

Petitioner did not recognize the Act's limited definition of "claim" in the lower courts either. Before the Court of Appeals, Petitioner argued that the False Claims Act was violated by the mere submission of a false claim for

"approval" by the Bankruptcy Court and that it was irrelevant whether the government paid any money in response to the allegedly false claim. Petitioner's Appendix 9, page 13. The Court of Appeals specifically rejected this argument, stating:

> Extending the False Claims Act to reach any false statement made to the government, regardless of any impact on the United States Treasury, would appear to impermissibly expand standing doctrine and essentially permit any plaintiff to sue on behalf of the government when false or misleading statements are made to any government agent including the courts, the legislature or any law enforcement officer.

Petitioner's Appendix 9, n.15.

Petitioner now contends that "frustration of public policy objectives is enough of an injury to the government" to sustain a False Claims Act claim. Petitioner's brief, pp. 10-11. This argument is made for the first time before this Court.

None of the cases cited by petitioner stand for the proposition that the frustration of public policy would constitute the requisite harm to the United States under the False Claims Act *without* any actual or potential economic harm. In fact, none of the cases cited even contemplate that a False Claims Act claim could survive without proof of actual or potential economic harm to the United States.

In *United States ex rel. Schumer v. Hughes,* 63 F.3d 1512 (9th Cir. 1994), the Court of Appeals reversed, in part, the trial court's grant of summary judgment dismissing the complaint because there was a genuine issue of

material fact as to whether the contractor's noncompliance with Cost Accounting Standards resulted in *claims against the United States* for unallowable costs. *Id.* at 1524-25.

Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956) concerned an analogous act, the Surplus Property Act of 1944, rather than the False Claims Act. While the Court acknowledged that it was not necessary to measure damages with specificity, there was no indication that some other form of injury could suffice in the absence of economic loss. Indeed, this Court observed that, although the actual damages might be difficult to ascertain, "[i]t is obvious that *injury to the Government* resulted from the Rex Trailer Company's fraudulent purchase of trucks." *Id.* at 153-54 (emphasis added).

In *United States v. Kensington Hosp.,* 760 F. Supp. 1120 (E.D. Pa. 1991), the False Claims Act violation alleged involved Medicaid payments for "services that were not medically necessary." The claim survived a motion to dismiss not because it held the potential for frustrating public policy regarding Medicaid, but because "[p]ayment for services not medically necessary clearly constitutes an *injury to the government* sufficient to withstand a motion to dismiss." *Id.* at 1127 (emphasis added).

In *United States ex rel. Luther v. Consolidated Indus., Inc.,* 720 F. Supp. 919 (N.D. Ala. 1989), the court cited the historic purpose of the False Claims Act to reach "all fraudulent attempts to cause the Government to pay out sums of money" as well as established precedent to that effect. *Id.* at 921 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1967)). Therefore, although the "bogus invoices" submitted by the subcontractor in *Luther*

had not yet been paid, the claims fell within the scope of the False Claims Act because payment would ultimately result in a *loss to the United States. Id.* at 922.

The weight of authority supports the Court of Appeals' conclusion that a "claim," as defined by the False Claims Act, must entail actual or potential economic loss to the United States. Since the Court of Appeals correctly rejected Petitioner's argument to expand liability, it is respectfully submitted that certiorari should be denied.

II

PROPERTY HELD BY THE CHAPTER 7 BANKRUPTCY ESTATE IS NOT GOVERNMENT PROPERTY UNDER THE FALSE CLAIMS ACT.

Petitioner now contends, for the first time, that debtors' estates in bankruptcy constitute government property subject to the provision of the False Claims Act. Petitioner correctly concedes that no caselaw exists to support his position.

The argument is that because a debtor's property is turned over to a trustee, whose fees and expenses must be approved by the Bankruptcy Court and the U.S. Trustee's Office, all Chapter 7 bankruptcy estates must be considered federal property subject to the False Claims Act. Neither the Bankruptcy Code nor the False Claims Act provide support for this novel theory.

Section 323 of the Bankruptcy Code makes clear that a trustee "is the **representative** of the estate." (emphasis added). The trustee acts on behalf of, not the government, but all creditors of the estate. Mary Davies Scott et al., *Collier on Bankruptcy* ¶ 323.02 (15th ed. 2002); *see also*

California State Bd. of Equalization v. Sierra Summit Inc., 490 U.S. 844, 849 (1989) (holding that "the trustee is the representative of the estate, **not an arm of the government**." (emphasis added)). The trustee has control over the bankruptcy estate and is entitled to administer the estate property and reduce it to money. *See* Scott et al. at ¶ 323.02; *In re Edmonston*, 107 F.3d 74, 76 (1st Cir. 1997) ("As the representative of the estate, the chapter 7 trustee is under a duty to collect and reduce to money the property of the estate.").

Research has disclosed no authority indicating that a trustee's representative capacity, or management and sale authority, converts a bankruptcy estate into government property.

In sum, petitioner's attempt at this late date to revolutionize bankruptcy law does not provide a legitimate basis for a grant of certiorari.

III

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS AND REACHED CONCLUSIONS AMPLY SUPPORTED BY THE EVIDENCE.

Petitioner claims that the Court of Appeals applied an incorrect "standard" in affirming the dismissal of his retaliatory discharge claim under 31 U.S.C. § 3730(h). His complaint is not with the legal standard applied, however, since he agrees that the Court of Appeals correctly defined the issues. Petitioner's Brief, p. 19. The fact is, he simply disagrees with the conclusion reached, *i.e.*, that the evidence does not support his claim. Because this finding is amply supported by the evidence, certiorari need not be granted.

The Court of Appeals affirmed the dismissal of Petitioner's retaliatory discharge claim based upon Petitioner's failure to show (1) that he was engaged in "protected conduct" and (2) that Respondent was on notice of the distinct possibility of False Claims Act litigation and retaliated against him because of his "protected conduct." Petitioner's Appendix 9, page 48.

Petitioner identified three activities that he identified as "protected conduct," (1) the August 2, 1995 memorandum he wrote to Louis DeLucia regarding Lexis fees; (2) his comments to the paralegal supervisor regarding the use of paralegals to perform secretarial functions and (3) his request for billing documents on the date that he was notified of his termination.

The primary focus of both the Court of Appeals opinion and the Petition before the Court is the August 2 memorandum.[2]

Throughout this litigation, Petitioner has asserted that on August 2, 1995, he "received an assignment from" his supervisor, Louis T. DeLucia, Esq., to research why certain electronic research costs were so high in a particular bankruptcy case. Petitioner's Appendix 6, p. 3; Petitioner's Appendix 14, pp. 1-2, ¶ 3. Indeed, the memo

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[2] The law firm could not have discharged Petitioner in retaliation for his request for billing documents on October 2, 1995 because the decision to terminate him was made on September 27, 1995. Petitioner's Appendix 9, pp. 4-7. Petitioner's alleged complaints to the paralegal supervisor are similarly lacking as proof of "protected conduct." In his deposition, Petitioner admitted that his complaint consisted of asking her on one occasion to confirm that another paralegal had complained to her regarding the tasks assigned to the paralegals. Petitioner's Appendix. 6, pp. 4, 25.

reporting the 1.5 multiplier to DeLucia begins, "Pursuant to your request. . . . "

Accordingly, the Court of Appeals noted, "when an employee is assigned the task of investigating fraud, 'such persons must make clear their intentions of bringing or assisting in a [False Claims Act] action in order to overcome the presumption that they are merely acting in accordance with their employment obligations." Petitioner's Appendix 9, p. 43 (quoting *Eberhardt v. Integrated Design & Constr., Inc.,* 167 F.3d 861, 868 (4th Cir. 1999)). Contrary to Petitioner's assertion, the Court of Appeals did not view his assignment as disqualifying him as a qui tam relator. The Court of Appeals considered the circumstances as giving rise to a heightened burden of proving that he engaged in "protected conduct" and put his employer on notice of the "distinct possibility" of litigation. Petitioner's Appendix 9, pp. 42-43.

This conclusion was entirely consistent with the cases cited from the Courts of Appeals in three other Circuits. Petitioner's Appendix 9, pp. 43-48. *Eberhardt, supra,* 167 F. 3d at 868; *United States ex rel. Ramseyer v. Century Healthcare,* 90 F.3d 1514, 1523 (10th Cir. 1996); *Robertson v. Bell Helicopter Textron, Inc.,* 32 F.3d 948, 952 (5th Cir. 1994).

Petitioner has cited no authority to support an argument that this conclusion is wrong or in conflict with any other Court of Appeals.

Instead, Petitioner disputes the application of this legal principle to the facts of this case. Specifically, he contends that he discovered the alleged billing fraud through inadvertence and not because he was directed to investigate the issue. Petitioner's brief, pp. 19-20; 29-30.

These arguments were considered and rejected by the Court of Appeals. Petitioner's Appendix 9, p. 53. The Court saw "no evidence that Hutchins engaged in any conduct, beyond what was specifically asked of him in accordance with his job duties." Petitioner's Appendix 9, p. 52. Petitioner's disagreement with the factual findings of the lower courts do not provide a reasonable basis for the grant of certiorari here.

Petitioner also disagrees with the Court of Appeals' conclusion that he failed to put his employer on notice of the "distinct possibility" of False Claims Act litigation.

As the Court of Appeals noted, the employee who alleges retaliatory discharge under the False Claims Act must prove that he was discriminated against "because of" his "protected conduct." Petitioner's Appendix 9, p. 32; 31 U.S.C. § 3730(h). If the employer lacks knowledge that the employee is contemplating a False Claims Act suit, there is no basis to conclude that the employer was motivated to retaliate against the employee for acting in furtherance of an action under the Act. Petitioner's Appendix 9, p. 32. In requiring the employee to "put his employer on notice of the 'distinct possibility' of False Claims Act litigation," the Court of Appeals expressly agreed with decisions reached by Courts of Appeals in four other Circuits. *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir.1998); *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864 (7th Cir. 1994); Petitioner's Appendix 9, p. 32.

Petitioner has cited no authority in conflict with this ruling. He suggests that *Yesudian* dispenses with any requirement that the employee warn his employer of the potential for False Claims Act litigation. Petitioner's brief, pp. 21-22. His reliance is misplaced, however. While it is true that the *Yesudian* court did not require an employee to explicitly warn his employer of impending action, the court clearly did not abandon the concept that the employer must be put on notice for liability to attach:

> Nonetheless, a plaintiff still must show that his employer was aware of his protected activity. Merely grumbling to the employer about job dissatisfaction or regulatory violation does not satisfy the requirement – just as it does not constitute protected activity in the first place.

Yesudian, 153 F.3d at 743.

Failing to show any genuine conflict between the opinion below and other cases, Petitioner's argument is reduced to his contention that the Court of Appeals erred in holding that he did not put his employer on notice of the potential for False Claims Act litigation. However, the facts he cites to support this contention, Petitioner's brief, pp. 23-24, were considered by the Court of Appeals and found lacking, Petitioner's Appendix 9, pp. 48-53. Petitioner's disagreement with that conclusion does not provide a reasonable basis for certiorari to be granted here.

CONCLUSION

It is respectfully submitted that, for the reasons and authorities cited above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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& BARRY, LLP
Attorneys for Respondents

Dated: May 17, 2002